This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

JOI
JRC
PI
TOME II
(1874)

RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

RAPPORTS

JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, professeur à la Faculté de Droit de l'Université Laval à Montréal

---

TOME XI

MONTREAL

C. O. BEAUCHEMIN & FILS, LIBRAIRES-IMPRIMEURS

256 et 258, rue Saint-Paul

1894

Enregistré conformément à l'acte du Parlement du Canada, en l'année mil huit cent quatre-vingt-quatorze, par W. J. Wilson, au bureau du Ministre de l'Agriculture, à Ottawa.

244536

CAUSES RAPPORTÉES

DANS CE VOLUME

A

PAGES.

Adams *vs.* Fleming *et vir*..... 271
Anderson *et al. et* Généreux..... 407

B

Beaudet *et* Proctor..... 458
Belanger *et al. vs.* Cyr..... 171
Bell *et al. vs.* Knowlton *et al*.... 439
Benjamin *vs.* Brewster et divers Opposants, *et* Cartier, Opp. et Cont..... 109
Bergevin *et al., vs.* Persillier *et al., et* Meloche, interv..... 322
Berlinguet & Drolet..... 119
Berriau *et* McCorkill..... 471 et 472
Bertrand *vs.* Dickinson..... 89
Blake *et al., vs.* Panet *et al*..... 13
Boswell *vs.* Lloyd *et al*.....145, 150, 151, 155 et 467
Boudrot *vs.* Locke *et al*..... 466
Bourbeau dit Verville, *Ex parte*. 263
Bouvier *et* Reeves..... 469 et 470
Brooks *et al.* & Clegg..... 124
Brown & Oakman *et al*..... 367
Browning *vs.* Yule, *et* Wales, interv..... 88

C

Canadian Inland Steam Navigation Co. *vs.* Reiffenstein... 405
Carroll *vs.* Ballard.. ..... 64 et 449
Champlain and St. Lawrence Ry Co. *et* Simard..... 476
Chapman *vs.* Clark *et al*..... 394
Chaput *vs.* Berry, *et* Sans-Cartier, oppte..... 3
Colemain *et al., vs.* Fairbairn... 512
Converse & Clark..... 113

PAGES.

Corporation du comté d'Yamaska & Rhéaume..... 208
Coulombe *vs.* Lemieux..... 317
Crevier *vs.* Sauriole dit Sansoucy 227
Cushing *vs.* Davies..... 311

D

Darche *et al., vs.* Dubuc..... 265
Darche *et al., vs.* Dubuc, *et* Dubuc, opp..... 359
Davies & Cushing..... 303
DeBeaujeu, *Ex parte*..... 493
Desforges & Dufaux *et al*..... 278
Desjardins & La Banque du Peuple..... 417
Douglass *et al., vs.* Le Maire, etc., de la cité de Montréal... 267
Doutney & Mullin..... 347
Dubois & Lamothe *et al*..... 177
Dubois & Ryan..... 214
Dumont *vs.* Dumont..... 495
Dunn *et* Bissonnette..... 474

F

Failes *et* La cité de Québec..... 362
Fenn *vs.* Bowker..... 416 et 512
Fisher *vs.* Provencher *et al*..... 327
Fitzimmons *vs.* Byrne *et ux*..... 102
Fréchette *vs.* St-Laurent..... 213

G

Gamsby *et al. et* Chapman..... 344
Gauthier *vs.* Lemieux..... 266
Gilmour *et al. vs.* Dyde *et al*.... 96
Giltner *et vir* & Gorrie..... 166
Globenski *et* Laviolette *et al*.... 500

PAGES.

Godin *vs.* McConnell..... 464
Gordon *et al. vs.* Pollock..... 357
Gravelle *vs.* Beaudoin..... 221
Grenier *et al. vs.* Fourquin *et al.* 268
Gugy & Ferguson..... 69
Gugy & Maguire..... 240
Guillet dit Tourangeau *vs.* Renaud..... 372

H

Hébert *et* La Fabrique de St-Jean..... 264
Herbert & Fennell..... 423
Herrick & Sixby..... 36
Heugh *et al.*, & Ross *et al*..... 233
Hobbs *vs.* Seymour *et al*..... 269
Hoffnung & Porter..... 422
Humphries *vs.* La Corporation de Montréal..... 319

J

Jersey & Rowell..... 333
Johnson *et al.*, *vs.* Geoffrion..... 328
Jordeson *vs.* McAdam *et al*..... 338

K

Kelly *vs.* Shrapnell..... 301
Kinlock *vs.* Scott, *et* Scott, opp. 466

L

Lacasse *vs.* Lacasse *et al*..... 465
Lacoste *vs.* Chauvin..... 221
Lamothe & Garceau..... 272
Lampson *vs.* Nesbitt, *et* Dinning *et al.*, int..... 401
Lampson *vs.* Taylor *et al.*, *et* Hughes *et al.*, reprenant l'instance..... 323
Langlois *vs.* Gauvreau *et al.*, *et* Gauvreau, opp..... 1
Langlois *vs.* La corporation de la paroisse de St-Roch-Sud *et al*..... 398
Leduc & Shaw *et al*..... 451
Lee *vs.* Burns..... 115
Lemesurier & Le conseil municipal du canton de Chester Ouest..... 90
Léonard, *Ex parte*..... 493
Leslie *et al.*, & Molson's Bank.. 77
Little & Diganard..... 5
Lynch *vs.* Hainault..... 391

M

PAGES.

MacFarlane & Desjardins, appelants, *et* Leclair & Leclair, intimés..... 128
Marois *vs.* Bernier, *et* Lariviè-re, opp..... 4
Martineau *vs.* Cadoret..... 113
McBlain & Oliver..... 437
McCulloch *et al.* & Hatfield..... 351
McDougall *vs.* Dubord, *et* Dubord *et al.*, opp..... 336
McGrath *et* O'Connor..... 480
McKenzie *vs.* Joseph..... 331
McKenzie *vs.* Tétu *et al*..... 71
McVeigh & Lussier..... 414
Moley, *Ex parte*..... 484
Montizambert & Murphy *et al.* 16
Montreal Fire Ins. Co. *vs.* The Stanstead, Shefford and Chambly Ry. Co., *et* Wood *et al.*, interv..... 340
Morgan *vs.* Benjamin..... 341
Morin *vs.* Legault dit Deslauriers..... 227
Morissette *vs.* Jodoin..... 95
Moss *et al.*, *vs.* Brown *et al.*, *et* Hardy, Dmdr en reprise d'instance..... 61

O

Oliva *vs.* Boissonnault..... 192
Orr *vs.* Hébert..... 111

P

Pacaud *vs.* Dubé, *et* Les Syndics, etc., opp..... 107
Patenaude & Lériger dit Laplante *et al*..... 105 et 391
Patez *et al.*, *vs.* Klein..... 447
Pelletier *et al.*, *vs.* Freer..... 59
People's Building Society & Evans, *et* Sprowls, Rep. l'inst. 383
Plamondon *et al.*, *vs.* Sauvageau..... 95
Plessis dit Bélair *vs.* Dubé..... 321
Poirier *vs.* Tassé *et al*..... 459
Poston *et al.*, *vs.* Hall *et al*..... 275
Poston *et al.*, *vs.* Thompson..... 67

R

Regina *et* Bellemare..... 490
Regina *vs.* Holt *et al*..... 393
Regina & Patton..... 394
Robertson *vs.* Stuart..... 461
Robinson, *Ex parte*, *et* Poirier, int..... 119

S

PAGES.
Séguin de Lasalle & Bergevin.. 222
Shaw *vs.* McDonald..... 236
St-Amand *et al.*, *vs.* Bourrett *et ux*..... 343
Surprenant *vs.* Surprenant *et al.* 104
Sweetapple *vs.* Guilt..... 330

T

Tarr *et al.*, *vs.* Desjardins..... 433
Trigg *et al.*, & Lavallée..... 182

W

PAGES.
Waggoner & Ricker *et al*..... 23
Walker *et al.*, *vs.* Ferns, *et* Divers Opp..... 165
Whelan *vs.* Keeler..... 400
Wilson *vs.* Pariseau, *et* Barrette, Int..... 404

Y

Yon *vs.* O'Connor, *et* O'Connor, opp..... 329

ABRÉVIATIONS.

P. D. T. M.:—Précis des Décisions des Tribunaux du district de Montréal, 1854, par T. K. RAMSAY et L. S. MORIN, avocats.

D. T. B. C.:—Décisions des Tribunaux du Bas-Canada, en 17 volumes, commencées en 1851, par MM. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.

J:—Lower Canada Jurist.

R. J. R. Q.: Rapports Judiciaires Revisés de la province de Québec, par le juge MATHIEU.

C. C.:—Code Civil du Bas-Canada.

C. P. C.:—Code de Procédure Civile du Bas-Canada.

S. R. Q.:—Statuts Refondus de la Province de Québec.

C. B. R.:—Cour du Banc de la Reine ou *Cour du Banc du Roi.*

C. S.:—Cour Supérieure du Bas-Canada.

RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

GARDIEN.—OPPOSITION.

COUR SUPÉRIEURE, Québec, 5 avril, 1862.

Présent : TASCHEREAU, Juge.

LANGLOIS, Demandeur, *vs.* GAUVREAU et al., Défendeurs, et GAUVREAU, Opposant.

Jugé : Que le gardien à une saisie mobilière peut s'opposer à une seconde saisie des mêmes effets, tant que la première saisie n'est pas vidée. (1)

Le 29 novembre, 1861, en vertu d'un alias bref d'exécution, émané de la Cour Supérieure pour le district de Rimouski, dans une cause de *Tanguay* vs. *Gauvreau,* No 122, les meubles et effets du présent Défendeur furent saisis et arrêtés, et le présent Opposant fut appointé gardien. La vente fut suspendue par une opposition afin d'annuler du Défendeur. Pendant la contestation de cette opposition, le 4 janvier dernier, les mêmes meubles et effets furent saisis et arrêtés de nouveau sur le Défendeur en la présente cause. Le présent opposant, qui était le gardien à la première saisie, produisit une opposition afin d'annuler à cette seconde saisie, demandant la nullité de cette saisie, parce que les meubles et effets y mentionnés étaient déjà sous saisie. Le Demandeur contesta cette opposition alléguant : 1° Que le gardien judiciaire à une saisie antérieure n'a aucun intérêt à s'opposer à une saisie postérieure des mêmes meubles et effets : 2° Que le gardien n'alléguait pas, dans son opposition, qu'il était en possession des meubles saisis en premier lieu, ni qu'il eût sur iceux aucun gage ou droit de rétention.

MONTAMBAULT, pour l'Opposant : Le gardien à une saisie antérieure a un intérêt direct à s'opposer à une seconde saisie des mêmes meubles et effets avant que la première saisie ne

(1) V. art. 577 et 866 C. P. C.

VRAIE COPIE

soit vidée. Le gardien judiciaire est appointé par autorité de justice pour veiller fidèlement à la conservation des effets saisis pour le profit du créancier premier saisissant, qui, en principe général, doit être payé en préférence aux autres créanciers. Ce gardien judiciaire peut être contraint de rapporter tous les effets saisis qui ont été confiés à sa garde, et, s'il ne les présente pas au jour de la vente le créancier premier saisissant peut le faire condamner à en payer la valeur, ou à être détenu en prison jusqu'à ce qu'il représente ces mêmes effets, ou qu'il en ait payé la valeur. Le gardien judiciaire a donc un intérêt direct à s'opposer à une seconde saisie, puisque sa liberté et sa fortune seraient en danger s'il laissait vendre les effets confiés à sa garde sans informer la justice du fait, et sans demander protection. Le gardien est raisonnablement la seule personne qui puisse prévenir la justice que ces effets sont déjà sous saisie, et que les droits et intérêts du premier saisissant seront compromis par la vente qui en serait faite en vertu de la seconde saisie. La maxime "*saisie sur saisie ne vaut,*" est parfaitement applicable dans ce cas. Un gardien n'est pas tenu d'alléguer dans une semblable opposition qu'il est en possession des meubles et effets saisis et confiés à sa garde, ni qu'il a un gage ou droit de rétention sur iceux, puisqu'il n'a que la garde de ces meubles et effets, et que la possession en demeure au saisi, suivant cette maxime: *main de justice ne dessaisit personne.* Il lui suffit d'alléguer et de prouver que les effets saisis en vertu de la seconde saisie se trouvent tous compris dans la première saisie. (1)

LANGLOIS, pour le Demandeur: L'Opposant est un gardien volontaire et n'a pas même la détention des meubles saisis, puisqu'ils ont été saisis en cette cause en la possession et au domicile du Défendeur. Il n'a donc aucun intérêt à empêcher la seconde saisie, puis qu'il n'a aucun lien sur les effets pour salaire comme gardien à une première saisie. Si les effets sont vendus en cette cause, il ne peut être contraint par corps à les représenter sur la première saisie. (2) Dans plusieurs cas il a été décidé que le gardien à une première saisie ne peut opposer la vente de meubles en vertu d'une seconde saisie. (3)

JUGEMENT: Considérant que Gauvreau allègue qu'il a été

(1) Pigeau, tom. I, p. 618 : Cout. de Paris, art. 178 ; Pothier, Orléans, art. 452, des Arrêts et Exécutions, tit. 10 ; Pothier, Proc. civ., ch. 2, § 5, p. 187 ; Pothier, *Traite du Contrat de Dépot*, ch. 4, art. 2, § 1, No 93 ; C. S., No 1866 *Smith et al.* vs. *O'Farrel* et *Colman*, oppt. 7 *R. J. R. Q.*, p. 331 ; *Dorion* vs. *Garneau* et *Beaubien*, gardien No 1748 de 1859. Jugé en Cour Supérieure et en Appel - Le Demandeur cita : *Donally* vs. *Nayle*, 7 *R. J. R. Q.*, p. 404.

(2) *Blakiston* vs. *Patton* and *Patton*, 9 *R. J. R. Q.*, p. 26.

(3) No 4598 de 1860, *Noël* vs. *Hamel*, Cour de Circuit. STUART, juge ; No 1555 de 1860, *Slevin* vs. *Murphy*, Cour Supérieure, BOWEN, Juge-en-Chef.

nommé et appointé gardien à la saisie judiciaire antérieurement faite des meubles du Défendeur P. L. Gauvreau, lesquels il allègue être les mêmes que ceux saisis en la présente cause: Considérant que, comme tel, il a un intérêt à opposer la dernière saisie judiciaire faite d'iceux meubles en la présente cause, et qu'il a droit de former une opposition afin d'annuler à la dite dernière saisie; renvoie la défense au fonds en droit du Demandeur à l'opposition afin d'annuler du dit A. E. Gauvreau, avec dépens contre le Demandeur. (12 *D. T. B. C.*, p. 158.)

CASAULT, LANGLOIS et ANGERS, pour le Demandeur.

FRENETTE, BILLY et MONTAMBAULT, pour l'Opposant.

FRAUDE.—DONATION.—CONTRAT DE MARIAGE.

COUR SUPÉRIEURE, Montréal, 30 décembre 1861.

Présent : BADGLEY, Juge.

CHAPUT, *ès-qualité*, Demandeur, *vs.* BERRY *alias* BÉRÉ, Défendeur, *et* SANS-CARTIER dit BOISSEAU, Opposante.

Jugé : Que, dans l'espèce, la donation de meubles portée dans un contrat de mariage, par le futur en faveur de la future, encore mineure, avec stipulation de séparation de biens, est une fraude à l'égard d'une personne ayant à réclamer contre le futur, pour cause de séduction ; et que la f-mme ne peut demander main-levée de la saisie de ces meubles faite sur le mari pour la satisfaction de la créance susdite.

Le Demandeur, en sa qualité de tuteur à Adelaïde Chaput, sa fille, obtint jugement contre le Défendeur, pour £12 10s. de dommages, et £22 3s. 9d. pour *frais de gésine*. Le 7 décembre 1860, le Demandeur fit saisir les meubles du Défendeur. Le shérif fut empêché de procéder à la vente par une opposition *afin d'annuler*, produite par Rose Sans-Cartier dit Boisseau, femme du Défendeur. L'Opposante alléguait : Qu'en vertu de son contrat de mariage, passé le 23 novembre 1859, elle était séparée de biens d'avec son mari ; que le Défendeur, par le dit contrat de mariage, a fait donation entre vifs et irrévocable à l'Opposante, ce acceptant de tous les meubles et objets mobiliers mentionnés en un état descriptif et estimatif annexé au dit contrat, desquels meubles et objets mobiliers l'Opposante pouvait jouir, user, faire et disposer en toute et pleine propriété, à compter de la date du contrat." Elle déclarait ensuite que le mariage avait été célébré le lendemain, et que les meubles et effets saisis sur le Défendeur étaient précisément ceux que ce dernier lui avait donnés par son contrat de mariage. Elle concluait à mainlevée de la

saisie. Le Demandeur contestant alléguait qu'à l'époque où les époux Béré avaient fait leurs conventions de mariage, sa fille était enceinte de l'enfant dont le Défendeur avait été déclaré le père, et que le don du Défendeur à sa femme avait été fait en fraude des droits d'Adélaïde Chaput, et pour soustraire le Défendeur aux conséquences de sa faute ; que d'ailleurs, l'Opposante n'avait jamais eu saisine légale des meubles qui n'avaient jamais été déplacés, et qui étaient toujours demeurés en la possession du Défendeur. L'Opposante répliqua que la donation avait été faite de bonne foi " et que, sans cette donation, le mariage n'aurait jamais eu lieu ; " et, à l'enquête, elle fit entendre sa mère qui déclara en effet que son consentement au mariage avait été donné à cette condition. Mais appelée à rendre témoignage par le Demandeur, l'Opposante déclara être *âgée de vingt ans*. Elle avoua avoir eu connaissance, à l'époque de son mariage, " des réclamations de la fille Chaput contre le Défendeur," et que le Défendeur n'avait pas d'autres biens que ceux dont il lui avait fait don.

THE COURT : " Considering that Opposant was a minor at the date of her contract of marriage, which was entered into by her without the assistance of her parents, or of a tutor therefor. Considering that the donation therein mentioned of the moveable effects therein described was ineffective, and that no tradition thereof had been made to her before her marriage, and, moreover, that no proof of such tradition to Opposant or of her possession of the moveables, at any time, has been established in evidence, doth dismiss the opposition with costs." (12 *D. T. B. C.*, p. 172.

LEBLANC et CASSIDY, pour le Demandeur contestant.

DUHAMEL, pour l'Opposante.

CONTESTATION DE COLLOCATION.—DEPENS.

SUPERIOR COURT, Québec, 5th December, 1861.

Before STUART, Justice.

MAROIS, Plaintiff, *vs.* BERNIER, Defendant, *and* LARIVIÈRE, Opposant.

Jugé : Que sur contestation du Certificat du Régistrateur, la partie colloquée par le protonotaire sera condamnée aux frais de contestation, à moins qu'elle ne produise un *remittitur* pour le montant surcolloqué. (1)

The Defendant's property was seized and sold by the sheriff, and the Registrar's Certificate was duly filed with the sheriff's

(1) V. art. 478 et 745. C. P. C.

return. Larivière was collocated for the full amount mentioned in the Registrar's Certificate. The Defendant contested the report of distribution, and the amount for which Larivière was collocated was very much reduced. The question raised was whether or not Larivière should pay the costs of contestation. For Larivière, it was argued that he should not be forced to pay these costs, because it was no fault of his that the Registrar's Certificate was incorrect. To this it was answered that Larivière was bound to pay the costs of contestation, because, without such contestation, he would unjustly have benefited by the collocation made according to the Registrar's Certificate, aud to free himself from the costs of a contestation of the report of distribution, he should have come before the Court voluntarily with a *remittitur*, and said that he was collocated for more than was justly due him ; not having done this, he made it necessary for Bernier to contest his collocation, in order to save himself from the loss to which he would otherwise have been subjected.

Judgment awarding costs against Larivière. (12 *D. T. B. C.*, p. 174.

PLAMONDON and GUILBAULT, for Defendant.

DELAGRAVE, for Larivière.

USUFRUIT.—FEMME MARIEE.

BANC DE LA REINE, EN APPEL, Québec, 12 juin 1861.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, MEREDITH et MONDELET, Juges.

LITTLE, Appelant, *et* DIGANARD, Intimée.

Jugé : 1° Que la construction d'une maison sur une propriété sujette à un usufruit, ne cause pas à cette propriété un changement suffisant pour mettre fin à tel usufruit. (1)

2° Qu'une femme séparée de biens d'avec son mari, ne peut affecter ses propriétés immobilières par une dette due par son mari, et pour le paiement de laquelle elle ne pourrait s'obliger personnellement. (2)

Le 4 octobre 1859, l'Appelant, demandeur, porte une action contre Jos. Bruno Talbot, et Hélène Diganard, son épouse, pour le recouvrement de £500, à lui dus pour argent prêté par obligation solidaire du 29 septembre 1856, devant Mtre Clapham, et conclut à ce que les Défendeurs soient solidairement condamnés à lui payer la somme réclamée. A cette action Hélène Diganard plaide qu'elle n'est pas tenue au paiement de

(1) V. art. 480 C. C.

(2) V. art. 1301 C. C.

cette dette, sur le principe qu'elle ne peut s'obliger que comme commune en biens, et non solidairement, et, de plus, qu'elle est séparée de biens, et que l'argent ainsi prêté avait été employé par le Défendeur Talbot pour l'aider à l'érection d'une maison à lui appartenant. La seule preuve consiste dans les réponses des Défendeurs sur faits et articles. Le 2 avril 1860, l'honorable juge Stuart rend un jugement déboutant l'action, quant à la Défenderesse Hélène Diganard, sur le principe qu'elle ne pouvait s'obliger que comme commune en biens avec son mari pour une dette par lui contractée, et qu'à l'époque du prêt au Défendeur elle était séparée de biens, et condamne le Défendeur Talbot à payer au Demandeur la somme réclamée. Le 12 juillet 1860, le Demandeur saisit $\frac{13}{18}$ d'un immeuble appartenant au Défendeur, situé sur les rues Notre-Dame et Lamontagne, Basse-Ville de Québec. A cette saisie, Hélène Diganard produit une opposition afin de distraire, au moyen de laquelle elle réclame l'usufruit créé en sa faveur sur cet immeuble, en vertu du testament de Georges E. C. Côté, décédé, son époux en premières noces, du 15 juillet 1834, devant Mtre Dugal ; elle allègue que l'immeuble saisi est identiquement le même que celui à elle légué dans le legs universel en usufruit de son premier mari ; elle allègue, en outre, avoir fait un inventaire au décès de son mari, et elle conclut qu'il soit fait *distraction de la saisie* faite sur le Défendeur, *de son droit d'usufruit créé et constitué* en sa faveur par le testament du dit Côté, son premier mari, et consistant en le revenu annuel des bâtisses saisies avec la *nue propriété*, et que la saisie réelle faite soit déclarée nulle et de nul effet quant au dit usufruit. Le Demandeur (l'appelant) conteste cette opposition seulement quant à la maison bâtie sur la rue Lamontagne, sur le principe qu'elle n'existait pas lors du décès de Côté, premier mari de l'Intimée, et que cette maison avait été érigée du consentement de Hélène Diganard, sur une partie du terrain à elle légué, et ce, avec l'argent prêté par le Demandeur. L'issue est jointe sur cette défense, et la preuve consiste dans une admission de faits citée au long par l'honorable juge Meredith lors de la reddition du jugement en appel. Le 2 mars, 1861, l'honorable juge Stuart rend un jugement maintenant l'opposition avec dépens : JUGEMENT :—"Conside-
" ring that opposant, Hélène Diganard, has the usufruct, du-
" ring her natural life, of the property seized, and that such
" usufruct can only be sold upon a judgment against her :
" Considering that nothing pleaded in the plea filed to said
" opposition by Plaintiff can, or does in law, operate a forfei-
" ture of the right of usufruct, doth maintain the opposition
" *afin de distraire*, and doth overrule and set aside the con-
" testation thereof ; and the court doth further declare oppo-

" sant, Hélène Diganard, to be proprietor of the usufruct of " the property seized, and doth order that from and out of " the seizure of the property, distraction be made in favour " of Hélène Diganard of the usufruct to her belonging and " claimed in and by her opposition, which usufruct consists in " the enjoyment by Hélène Diganard, during the period of " her life, of the rents and revenues of the property, buildings " and appurtenances so seized; and doth grant *mainlevée* of " the seizure to opposant, in so far as the usufruct is concern- " ed, as prayed in and by her opposition." C'est de ce juge- " ment qu'il est interjeté appel.

KERR, for Appelant: The Respondent, by her opposition, would fain persuade the court that, at the time of her first husband's death, the lot seized was exactly in the same state, having upon it the same buildings, as at the date of her opposition. A more thoroughly fraudulent transaction Appelant believes never came under the notice of a Court of Justice. Talbot and his wife borrow from present Appellant £800, to be repaid in three years, with interest. They contract with Châteauvert, a mason, for the building of a house, on a portion of the lot in question, and also for repairs to be made to the other buildings then existing thereon; as security, they mortgage the whole of the lot. The house is built, and Talbot and his wife profit to the extent of £2,300, that being the balance due by them to Chateauvert and Appellant. No sooner however are demands made upon them for re-payment of the money so borrowed, and for payment of the cost of the buildings and repairs, than the wife pleads the nullity of the contracts entered into by her, declares that the house so built is the property of her husband, in which she has no interest, invokes the *moyens* of nullity granted to married women by statute to protect them from being victimised by their husbands' creditors, and succeeds as against present Appellant, who is declared to have no recourse against her. In the meantime, as may be gathered from her own opposition, and the admissions filed, she collects all the rents of the house so erected with Appellant's money, and benefits by his loss. The ground upon which Respondent relies for the maintenance of her pretension, that she is entitled to the usufruct of the house built by Talbot, upon Mountain Street, is, that such house is an accession to the lot originally bequeathed to her by Côté; that she consequently stands in the same position as the proprietor, had the house been built by any other than Talbot, quoad her usufructary interest; and that, having a right of usufruct of the ground whereon it was built, the rule *accessorium sequitur principale* applies, and the house is subject to her life enjoyment. On the part

of Appellant it is contended, that the building of a house upon a portion of the lot bequeathed, is such a *mutata mutatione rei* as to extinguish the usufruct thereon. According to the principles of the Roman law, it is not necessary that the thing should be totally lost, in order to produce such an effect, but any important change, a *mutata forma rei* is sufficient. Is not the change effected in this instance one of form? Is not the aspect of that portion of the lot completely altered? If a usufruct, created on a house, be put an end to by its destruction, the *usufruitier* having no right to the place whereon it stood, surely the converse of that principle is correct. It was pretended, in the lower Court, that the legacy to Respondent being universal, a portion of the lot only having changed in form, no effect whatsoever was produced on the rights of the legatee, save that she was entitled to the enjoyment of the house producing such change. Reliance was placed upon the difference existing between the universal residuary legatee of the usufruct of an estate, and the legatee of the usufruct of a particular immoveable. It is true that, in the first case, the usufruct of the whole estate is not destroyed by the change of form of a part, but the usufruct of that portion of the estate, the form of which is changed in a manner similar to the portion of the lot, the subject of contestation in this cause, is thereby extinguished. It is to be remembered, that the contest, quoad the right of usufruct, is not between the *propriétaire* and the *usufruitière*, but is between the latter person and those who have been defrauded by her, and the proprietor's representatives (they acting in concert,) into spending their time, labour and materials, and advancing their money to erect a building, built, it may be said, entirely by them, at their own expense, and of which Respondent now wishes to claim the usufruct, and thus to benefit by her own and her husband's fraud. From the fact of Respondent having permitted the erection of the house in question on the lot subject to her usufruct, is not the conclusion to be drawn that she thereby waived her right, and that, if she be entitled to any recompense whatsoever, it is merely the actual value of the usufruct of the naked lot of ground? The principle of "on ne peut pas s'enrichir aux dépens d'autrui," certainly applies most forcibly to the present case in favour of Appellant's pretensions, and should, with the other grounds urged, tend to turn the scale of justice in his favour. Another point presenting itself for the consideration of the Court is, that whilst Defendant and Respondent were maturing their schemes, by which they might, without any expense or money, cause to be built for their benefit, a house costing nearly £2,000, they overlooked the fact that the house erected

by Talbot, the husband, on ground subject to his wife's usufruct, if declared to be subject to that right, would be such an advantage conferred upon her by him, as is prohibited by the 282nd Article of the Coutume. "Non seulement" says Pothier (1) "il n'est pas permis à l'un des conjoints de donner à l'autre conjoint les choses mêmes; il ne lui est pas même permis de lui en donner la jouissance." Can any authority be more direct and conclusive? We have, in the present case, the husband essaying to give to his wife the usufruct of that of which he has defrauded his creditors, to better her condition by the gift of the *jouissance* of a house built by him, and for which he has not paid, to withdraw from his own domain and to render, during his wife's lifetime, unavailable to those having claims against him, a large portion of his estate.

TALBOT, pour l'Intimée: L'Intimée soutient que la question qui s'élève est de savoir si l'usufruitière a droit de réclamer son droit d'usufruit sur la maison construite suivant les termes du marché intervenu entre les parties. L'Intimée maintient qu'elle a incontestablement ce droit. Elle ne pouvait empêcher raisonnablement cette érection, et nonobstant qu'elle ait comparu au marché du 16 septembre, 1856, elle n'a pas cependant renoncé aux droits d'usufruit qu'elle avait, et que lui donnait réellement la portion de l'immeuble sur laquelle on a érigé la maison en question. Elle n'a jamais non plus renoncé à l'augmentation de l'usufruit que lui donnait la bâtisse. Cette érection nouvelle est loin d'être une des causes qui mettent fin à l'usufruit. L'Intimé a été rigoureusement obligée de faire opposition pour réclamer son usufruit, attendu que, dans la saisie, aucune réserve n'était faite de ses droits sur aucune des deux maisons, nonobstant que le saisissant connût parfaitement les droits de l'Intimée, et cela d'autant plus qu'elle avait produit dans la cause, avec ses réponses sur faits et articles, le testament et tous les titres qui constituaient son droit d'usufruit. La propriété sur laquelle on a bâti la nouvelle maison donnait des revenus annuels à l'Intimée, elle a par là même droit à l'augmentation, à la plus value des fruits de la propriété, comme faisant partie de son usufruit. (2)

MEREDITH, Justice: The Respondent is the usufructuary, for the term of her natural life, of the lot of land and premises

(1) No. 36, Don entre mari et femme.

(2) 4 Duranton, Ed. Belge, No. 1492; 4 Pothier, Douaire, Nos. 241, 255; 3 Toull., Nos. 418 et 442; 4 Pothier, Propriété, Nos. 169, 170 et 203; 2 Proudhon, Usufruit, Nos. 478, 901 et 904; 2 Dict de Législation Usuelle, p. 610; 1 Proudhon, Usufruit, Nos. 25, 30 et 31; 4 Duranton, Nos. 686 et 689; 2 Marcadé, sur l'art. 555, Nos. 431 et 518; 17 Guyot, Rep., vbo. Usufruit, p. 390; 4 Pandectes de Justinien par Pothier, p. 184.

seized. Her husband, Joseph Bruno Talbot, a co-Defendant with her in the Court below, is the owner of $\frac{13}{16}$th of the same property, which is situated in this city, and is bounded, in front, by Mountain street, and in rear by Notre Dame street. Since the parties have thus been possessed of the property in question, they have put up a valuable stone and brick house on that part of the emplacement bounded by Mountain street. The house so erected, which forms part of the premises seized, was built by Pierre Chateauvert, under contract with the parties (Talbot and his wife) bearing date the 16th day of September, 1856. On the 29th day of September, 1856, Plaintiff lent Talbot and his wife the sum of £800 for which they mortgaged the said emplacement with the buildings then erected, and thereafter to be erected thereon. The sum so lent not having been paid when due, Plaintiff instituted the present action for the recovery thereof; and Mrs. Talbot, the Respondent, having pleaded that she had received no consideration for the obligation to which she had so become a party, that, on the contrary, the debt in question was a debt due by her husband, for which, according to law she could not become responsible; the action was dismissed as against her, and judgment was rendered against her husband alone. In execution of this judgment, the lot of land and premises already mentioned having been seized, Respondent has filed an opposition *afin de distraire* claiming that the seizure so made be set aside, in so far as regards her usufruct of the emplacement and premises seized. The Appellant (Plaintiff in the Court below) contested the opposition thus filed, in so far as regards the house built by Châteauvert upon the lot in question, and the land upon which that house stands; one of the allegations in the contestation being that the sum of £800, so lent by Plaintiff, had been spent in the erection of the house. Issue was joined upon the contestation, and, during the *enquête*, the following admission were filed: The Plaintiff, contesting party and opposant, to save costs, admit: 1° That, at the time of Côté's death, he was possessed, as proprietor, of the lot of land seized in this cause; 2° that, at the time, the buildings on the lot, with the exception of the three story stone and brick house on Mountain street, were as described in the sheriff's advertisement of the sale made and filed; 3° that, on the twenty-ninth day of September, 1856, Plaintiff lent and advanced to Defendants the sum of eight hundred pounds, as evidenced by deed passed before Clapham and colleague, notaries, and by which they promised, jointly, to repay the same to him as therein specified, and mortgaged, as security therefor, the lot of land and buildings, erected, and thereon to be erected; 4° that, at

the time, the said sum of money was so borrowed, the said three story stone and brick house on Mountain street had not as yet been built on the said lot; 5° that the said money was so borrowed from Plaintiff with the intention therewith to build the said house, and that the said sum was, or the greater portion thereof, expended in building the same. The judgment of the Court below dismissed Plaintiff's contestation, and it is from that judgment that the present appeal has been instituted. On the part of Appellant, it is contended that the building of a house upon a portion of the lot bequeathed, is such a change of the part of the property, as to put an end to the usufruct. The erection of a house on a vacant lot, evidently tends to increase the revenue yielded by such lot; and it seems unreasonable to say that a work, the direct tendency of which is to improve a usufruct, should, according to law, destroy the usufruct which, as a matter of fact, it tends to improve, Several authorities in support of that pretension have however been cited from the Roman law; but I may observe that these authorities refer to the case of usufruct established upon a particular property, which is not the case before us. The authorities from the Roman law, cited by Appellant, as well as those referred to by Respondent, are to be found in the 4th vol. of the Pandects of Justinian by Pothier, from page 182 to page 186; but I do not deem it necessary to dwell at any length upon those authorities, because our own law on the subject is so reasonable and is so clearly laid down by Pothier, as according to my view, to leave no room for doubt. In his *Traité du Douaire*, No. 255, vol. 4, page 121, after reviewing the opinions of the Roman jurists, Pothier says: " Dans notre Droit Français, on ne s'attache pas aux subti-" lités du Droit Romain; et soit que l'usufruit soit d'une " universalité de biens, soit qu'il soit l'usufruit spécial d'une " certaine chose, lorsque la chose chargée d'usufruit a changé " de forme, et a été convertie en une autre chose, on doit dé-" cider que l'usufruit n'est pas éteint, et qu'il doit subsister " dans la chose en laquelle a été convertie celle qui a été " chargée de l'usufruit. C'est pourquoi, si l'on a donné à une " femme pour son douaire conventionnel, l'usufruit d'une " maison; si la maison vient à être incendiée par le feu du " ciel, et que le propriétaire ne juge pas à propos de la rebâtir, " la douairière doit jouir par usufruit de la place, et la louer " comme elle pourra; et elle doit pareillement jouir en " usufruit du prix que seront vendus les matériaux qui en " restent; si, au contraire, le propriétaire rebâtit la maison " la douairière aura l'usufruit de la maison qui aura été re-" bâtie." As well upon the foregoing authority, as upon the reason of the thing, I am satisfied that the pretension of

Appellant, now being considered, was rightly overruled. It is also contended by Appellant that Respondent having permitted the erection of the house in question on the lot subject to her usufruct thereby *waived her right ;* by which I understand her right to that part of the lot upon which the house was built. The answer to this pretension is, that Respondent as a married woman could not bind her property for a debt for which she could not make herself liable ; that she could not make herself liable for the debt in question, except to the extent that the loan for which that debt was contracted was required to improve her usufruct ; and that, although it is now admitted that the sum loaned by Plaintiff, or the greater part thereof, was expended in building the house ; yet, it does not appear to what extent that expenditure improved the usufruct of Respondent, as compared with the *nue propriété* belonging to her husband and others ; and therefore we cannot say to what extent Respondent could have waived her usufruct so as to admit of the creation of a valid hypothec in favour of Appellant. It is much to be regretted that the facts which now are in evidence before us, could not have been, or at least were not established in the course of the original action by Appelant against Respondent. It is now formally admitted that the sum of £800 in question " was borrowed " from Plaintiff, with the intention to build therewith the " said house, and that the said sum, or the greater part " thereof, was expended in building the same." If the facts thus admitted had been established under the issue raised in the original action, Plaintiff would have been entitled to an *expertise* to determine to what extent the usufruct of Respondent was increased in value by the expenditure so made, and to that extent the notarial obligation would have been binding upon her. It is in consequence of the necessary proof not having been adduced at the proper stage of the proceedings that the judgment of the court below has a tendency to enable the husband of Respondent to confer upon her an advantage contrary to the 282nd article of our custom. We are not now called upon to determine whether any, and if any, what redress may yet be available to Appellant. The question and the only question for our consideration is, as to the correctness of the judgment of the court below setting aside the seizure made in this cause in so far as regards the usufruct of Respondent. In determining that question, it is proper to bear in mind that the usufructuary estate claimed by Respondent, is, in contemplation of law, a separate and distinct property from the *nue propriété* belonging to her husband. The rule on this subject is very clearly expressed by Proudhon : " L'usufruit d'un fonds doit donc être envisagé comme un

" immeuble particulier, civilement séparé et distinct de la nue " propriété." (1) Bearing this is mind, and seeing that the usufruct thus belonging to Respondent and claimed by her, has been seized, not under a judgment against herself, but under a judgment *against her husband, and for the satisfaction of a debt, which it has been judicially declared she does not owe*, it seems to me to be certain that the judgment of the court below is right. Indeed, I would hardly have felt myself justified in entering at such length into the foregoing explanations, were it not for the magnitude of the sum involved, and the care with which the case was argued.

Les prétentions de l'Appelant ne purent prévaloir et la décision de la Cour Supérieure fut confirmée à l'unanimité de la Cour du Banc de la Reine, en donnant pour motif qu'il n'y avait pas mal jugé dans l'arrêt de la Cour Supérieure. (12 *D. T. B. C.*, p. 178.)

CAMPBELL et KERR, pour l'Appelant.

TALBOT, pour l'Intimée.

COMMISSION DU SHERIF.

SUPERIOR COURT, Quebec, 5 mars, 1862.

Before STUART, Justice.

BLAKE, et al., *vs.* PANET, et al.

Jugé : Que le shérif a droit à son *poundage* sur toute vente de propriétés, dans tous cas, soit qu'il reçoive le prix ou qu'un cautionnement soit donné tel que voulu par la loi. (2)

On the 18th of July, 1861, the sheriff of this district, under a writ of *fieri facias*, proceeded to the sale and adjudication of a certain immoveable property, which, by the judgment rendered in the cause, had been declared hypothecated to and in favor of Plaintiffs. The plaintiffs became the *adjudicataires*, and a bond was by them given in the manner provided by the Con. Stat. for Lower Canada, cap. 85, sec. 13. On the 3rd of September. 1861, the sheriff duly filed his schedule of return, in which, in the list of sheriff's fees and disbursements, was found an item of $120.00, charged as poundage on the above mentioned sale. On the 5th December, 1861, a motion was made on behalf of Plaintiffs that: " inasmuch as no monies " have been levied by the sheriff of the district of Quebec, " by reason of the sale of the immoveable property of Defen-

(1) Proudhon, *Usuf.*, 1 vol,, p. 16, No 23.

(2) V. S. de Q. de 1892, 55, 56 V. ch. 41.

" dants mentioned in his schedule of return filed, on the third " day of September last, but the same has been purchased by " Plaintiffs, and a bond by them given in the manner provided " by law, the sheriff be directed to amend his schedule of " return, in so far as respects the sum of money therein men- " tioned as a charge for poundage, to wit: the sum of £30 " and that the sheriff be not allowed any such sum of money " as part of his fees and disbursements in the present cause."

An appearance was put in for the sheriff, and at the hearing:

IRVINE, for Plaintiffs: Relied entirely upon the 95 cap. con. stats. of Lower Canada, which allowed the sheriff to charge poundage on any monies he levied on sheriff's sales, but, in which statute, there was no mention whatever made of poundage being allowed to the sheriff where he received no money at all, but simply a bond for the payment of the money.

PARKIN, for the sheriff: Urged that, by the con. stats. of Lower Canada, the sheriff is allowed all his disbursements, and is authorized to charge, over and above, at the rate of 2½ per cent for poundage, to be deducted out of the money he levies; (1) to " levy " does not mean actually to receive money; by several statutes, it is enacted, that *a percentage shall be paid upon a levy*, in cases in which it is not absolutely necessary that the monies should come into the sheriff's hands at all; thus, it is enacted in the con. stats. for Lower Canada, chap. 85, sect. 2, § 4, that the execution shall first be levied against the moveables, and that if this levy produces no money, it shall then be levied against the real estate. Impey, in his " office of sheriff," p. 131, says, if the sheriff levy, he is entitled to poundage, though the parties compound before he sells any of Defendant's goods. The idea here clearly is that the seizure in execution takes place but no sale, and, consequently, no money comes into the sheriff's hands. In *Alchin* vs. *Wells* 5 T. R. 470, cited in Impey, p. 132, it was decided that the sheriff is entitled to poundage for levying on execution, there is no question that the sheriff is entitled to poundage when he receives money on an execution, so that this case must be looked at as a decision that the sheriff is entitled to poundage upon a simple seizure, and in p. 128 of the same work, it is said the sheriff is entitled to *poundage on the sum he shall so levy* or extend and deliver in execution. Burrill, in his law dictionary, explains the word levy as a taking or seizing in execution, to apply an execution to a property, to subject property to the operation of an execution. I also refer to the case n° 150 of 1811, *Hoyt* vs. *Thillon*, and the sheriff Opposant, in which it was held by Chief Justice SEWELL, sitting at

(1) Con. stats. Lower Canada, cap. 85, sec. 9.

Quebec, that all money paid by the sheriff on a sale by *décret criée* is a disbursement which he has a right to charge, to the bailiff for a *criée* but he has no right to charge for his own warrant to seize, or for his draft of his advertisement of the sale, these being services which he performs personally, and which are paid for by the fees allowed on executions, and the poundage given by the ordinance 25 Geo. III, chap. 2, sec. 35. (1)

CASAULT, counsel for the sheriff: D'après le droit commun, le shérif est obligé d'exécuter tous les writs de Sa Majesté sans rémunération ni paiement aucun, et il ne peut exiger maintenant que ceux qui lui sont accordés par la loi. (2) Il a été décidé que le shérif n'a pas droit au *poundage* s'il n'y a pas eu de saisie, (if there has been no actual levy) quoique l'argent lui soit payé, et dans la cause de *Hutchinson* vs. *Birch*, sous citée, qu'il ne pouvait pas exiger le *poundage* sur *colorable levy*. (3) Mais il est en droit d'exiger ce *poundage* après la saisie quand bien même les parties transigeraient avant la vente. Mais le shérif a ce droit sur le montant entier de la vente, quand bien même la partie aurait payé directement à son créancier. (4) Le shérif peut même prendre en exécution pour son poundage. (5)

STUART, Justice: This is a very important question, and one which has not as yet come under the notice of the Court; as to whether the Sheriff is entitled to the usual poundage granted him by the Con. Stats. of Lower Canada, ch. 82, sec. 9, where it is enacted that the sheriff shall be entitled to 2½ per cent out of the monies he levies, &c., when instead of receiving the money he takes a bond from the purchaser in the manner provided by law. The question lies in the meaning of the word levy, what is a levy, and when does it take place. Is the mere seizure of the property by the sheriff sufficient to constitute a levy. Or is it necessary that a sale should take

(1) 8 Meeson and Welsby, p. 249, *Chapman* vs. *Boulby*; 21 *Law journal*, (Com. pleas), p. 194, Holmes and Sparks; 4 Maule and Selwyn, p. 256, *Rawstorne* vs. *Wilkinson*; 6 Espinasse, p. 111, *Bullen* vs. *Ansley*; 12 Meeson and Welsby, p. 31, *Davis* vs. *Edmonds*; 5 Dowling, (new series), p. 37, *Curtis* vs. vs. *Mayne*; Petersdoff's, *Abridgement*, p. 612, *Lake* vs. *Turner*.

(2) 1 Chitty's *Practice*, p. 595; *Graham* vs. *Grill*, 2 Maule and Selwyn's reports, p. 294; *Rex* vs. *Palmer*, 2 East's reports, p. 411; *Colls* vs. *Coates*, 11 Adolphus and Ellis reports, p. 826.

(3) *Graham* vs. *Grill*, ci-dessus cité, p. 296; *Colls* vs. *Coates*, ci-dessus cité, p. 826, et la même cause rapportée en Perry and Davis reports, vol. 3, p. 511; *Hutchinson* vs. *Birch*, 4 Taunt 619; *Alchin* vs. *Wells*, 5 Term reports, p. 470; *Chapman* vs. *Boulby*, 8 Meeson and Welsby, p. 249; *Holmes* vs. *Sparkes*, 21 *Law journal* (com. pleas) p. 194. *Rawstone* vs. *Wilkinson*, 4 Maule and Selwyn's reports, p. 256; *Bullen* vs. *Ansley*, 6 Espinasse, p. 111.

(4) *Davis* vs. *Edmonds*, 12 Meeson and Welsby, p. 31.

(5) *Curtis* vs. *Mayne*, 5 Dowling, new series, p. 37.

place and that the monies arisen therefrom should be paid into the hands of the sheriff? But the objection taken at the bar to the mode in which this matter is brought before the Court is conclusive, we can make no order upon the sheriff. If he takes more than the law allows him, an action to recover the sum paid is the remedy, in such an action the whole question would arise, it cannot be decided on motion. Judgment take nothing by the motion. (12 *D. T. B. C.*, p. 189.)

HOLT and IRVINE, for Plaintiff.

PARKIN, for Sheriff.

CASAULT, counsel for Sheriff.

LICITATION D'UN TERRAIN AFFECTE A UNE RENTE CONSTITUEE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 12 décember, 1862.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

MONTIZAMBERT, ès qua., Appellant, and MURPHY, et al., Respondents.

Jugé: Que si une licitation forcée est conduite de manière à ne porter atteinte à aucun des droits hypothécaires du propriétaire d'une rente constituée, il ne sera pas permis à tel propriétaire de réclamer le principal de telle rente. (1)

This was an action *en licitation*. Montizambert, the Opposant, in his quality of curator to the vacant estate and succession of John Coffin, by his *opposition afin de conserver*, opposed the payment of the monies to arise from the sale of the property, to the end that, out of said monies, he might, by special privilege of *bailleur de fonds*, be collocated and paid a sum of £169 0 0. In support of his opposition, he produced a deed of sale, dated the 6th February, 1826, by John Coffin, to Peter Murphy, of the property in question in the cause, for the price of £169 0 0, which it was, by the deed of sale, agreed should remain in the hands of Peter Murphy, the purchaser, and his heirs, as the capital of an annual and constituted rent, for securing which capital sum, Murphy, by the deed of sale, specially mortgaged the property sold, by privilege of *bailleur de fonds*, it being specially agreed that this latter obligation and the *constitut* should in no wise derogate from one another. It was alleged that on the 27th of February, 1856, the legal representatives of Peter Murphy, deceased, granted *titre nouvel* of the deed above mentioned in favor of the legal representatives of John Coffin, deceased, with the express con-

(1) V. art. 935 et 936 C. P. C.

dition that nothing therein contained should in any wise affect or prejudice such other rights as the legal representatives of Coffin might have upon the property, nor be construed to create novation of hypothec. The Plaintiffs contested the opposition, and by their perpetual exception, alleged, that, by the judgment rendered in the cause, it was ordered that the property in question should be sold, subject to and in accordance with the list of charges to be filed and approved of; that, in pursuance of said judgment, a list of charges was filed by Plaintiffs, by which they declared that they proposed to sell the property in question subject to the payment to the legal representatives of John Coffin of an annual constituted rent of £10 0 0; that the list of charges was, by a judgment of the court duly approved; that the sale of the property subject to the charges mentioned in the list of charges was duly published in the manner required by law; that the sale took place subject to the payment of the annual and constituted rent due the legal representatives of John Coffin; that the court confirmed the sale subject to said charges, by adjudging the property to the highest and last bidder, Thomas Wall, who thereby and by the payment of £570 0 0, became the purchaser and proprietor of the property, subject to the annual and constituted rent to and in favor of the heirs Coffin; that, if Opposant was collocated out of the sum of £570 0 0 for the capital of the constituted rent, the nature and conditions of the sale would be altogether changed and injustice done as well to Plaintiffs as to Defendant, and the *adjudicataire* in the cause would be released from one of the charges subject to which the property was sold. The Opposant answered that he could not, as holder of the constituted rent secured by privilege of *bailleur de fonds*, be forced to proceed by *opposition afin de charge*; that it was optional with him to proceed in that way or by his present opposition; that he could not be deprived of such option without his consent; that the several judgments in the cause were null and void in so far as he was concerned, inasmuch as he was not a party to the same; that the matters and things in said judgments decreed and decided were *res inter alios judicata*, as regarded him, and as such, were not binding on him; and that it was not competent for the parties by consenting to, or for the judge by approving of the insertion of a clause in the register of charges, without his knowledge or consent, to deprive him of his said option; that the several public notices mentioned in the perpetual exception did not convey any notice whatever to him either in fact or in law, that Plaintiffs and Defendant had colluded or collusively attempted to defraud and deprive him of his right to demand the re-imbursement of the capital by falsely and

illegally describing the constituted rent in the register of charges as a charge upon the property.

STUART, G. O. for Plaintiffs, urged in the Superior Court, that the opposition should be dismissed and Plaintiffs exception maintained, because, in virtue of the 48th cap. Con. Stats. for Lower Canada, the sale by licitation made after certain prescribed formalities (which formalities had been fulfilled in the present case) had the effect of a *décret* and purged the property sold of all charges, privileges, hypothecs, &c., in the same manner as adjudications upon execution against immoveables, excepting the charges entered in the register of charges; that, if Opposant had any other rights than those granted him in the published register of charges, he should have produced his *opposition afin de charge*, and thus have prevented the sale until such time as his said rights had been definitively settled by the court; that not having done so, he could not now succeed on his *opposition afin de conserver*, and thus completely annul the sale and adjudication which had taken place.

MONTIZAMBERT, for opposant argued, in the Superior Court: 1st. That opposant, as holder of the constituted rent, was an hypothecary creditor of Plaintiffs and Defendant; and that in the event of any sale by *décret*, or other judicial sale of the hypothecated property, it rested with him opposant, and with him alone, to decide whether the capital of the rent should be paid to him out of the proceeds of the sale, or whether, on the contrary, the rent itself should be converted into a *charge réelle* on the property, and be paid in future by the purchaser; 2d. that, if Plaintiffs and Defendant could deprive him of his option in this respect, and thus of his capital, without his knowledge and consent, by putting his claim in the list of charges, they could do the same with any judgment creditor or other hypothecary creditor, and *à fortiori* with any simple contract creditor, for if as to one *dette exigible*, why not as to another? 3rd. that the order of the court approving of the list of charges was *res inter alios judicata* as to opposant; 4th. that, if the publications relied on by Plaintiffs were notice of such order to opposant, they could only have been so for the purpose of putting him *in mora* to file an *opposition afin d'annuler*; 5th. that it would be inconsistent for the court to hold that it was addressed to him for that purpose; 6th. that, even if it were, parties neglecting to file *opposition afin d'annuler*, in cases of forced licitations, were expressly allowed to convert their recourse into an *opposition afin de conserver* on the monies; (1) 7th. that, to deny to opposant

(1) *Con. Stats. Lower Canada*, cap. 48, sec. 6. et art. 729 C. P. C.

the enjoyment of the option and recourse he contended for, was to deprive the heirs he represented of an opportunity the law had given to them, and perhaps the only opportunity they might ever have, of recovering and placing at a high interest a sum now invested at a low rate; 8th. that there must be a remedy for every wrong; that, in this case, the wrong done to opposant by Plaintiffs and Defendant, or attempted to be done by them, could be remedied, or averted, without injury to the *adjudicataire*, or any alteration of the conditions of his purchase, by subrogating Plaintiffs and Defendant to opposant for the *rente* from the date of the judgment of distribution awarding the amount of its capital to the opposant out of the balance of the money paid into court, which would otherwise belong to them. And for authorities in support of this view of the case the following were cited: (1)

JUDGMENT of the Superior Court rendered the 5th March, 1862, STUART, J.: "Considering that Plaintiffs have well and sufficiently established in evidence the fact by them pleaded in and by their perpetual peremptory exception to the *opposition afin de conserver* of Edward Lewis Montizambert, *ès qualités;* considering that the sale by licitation was made subject to the charge of paying for the future the constitut claimed by Montizambert, *ès qualités.* and that the conditions upon which the said sale by licitation was made cannot now be changed, without setting aside the sale. Considering that Montizambert has acquiesced in the sale, and the conditions of the same, by not objecting in any way to the same, the court doth maintain the plea of perpetual exception, and doth dismiss the opposition, &c.' On appeal from the judgment.

MEREDITH, Justice: In this case certain real estate has been brought to sale by forced *licitation*, in accordance with the provisions of the 48th chapter of the Con. Stats. of L. C.,

(1) Reimbursement of capital of *rente* may be claimed in case of sale by *décret*, Recueil de Bretonnier, vbo. *Rentes*, *Remboursement* p. 310; Rep. Jurisprudence, vbo. *Rente*; 4 Ancien Denisart, p. 202, No. 13, vbo. *Remboursement;* 2 Prevot de la Jannes Juris., Française, pp. 270 et 271; Pocquet de Livonnière, *Règles du Droit Français*, liv. IV cap. 3, Règle 13, p. 336; Lacombe, Recueil de Jurisp., vbo. *Décret* No. 13, p. 160; Loyseau, *Traité du Déguerpissement*, liv. 3, cap. 9 Nos. 4 et 5; and in any case of Judicial sale, Pocquet de Livonnière, *Règles du Droit Français*, liv. 4, cap. 3, Règle 13, p. 336; capital of *rente* exigible *ex accidente*, Pothier, *Contrat de rente* No. 114; *Puta* par le décret de quelque héritage hypothéqué à la rente, Pothier, *Traité de la Communauté*, No. 83; Sale by licitation has the effect of a *décret Con. Stats. Lower Canada*, cap. 48, sec. 5; Rente Constituée n'est pas une charge réelle mais une hypothèque, Ferrière, Dict. de Droit, vbo. *Rente Constituée*; An opposition *afin de charge* for a *rente constituée* cannot be maintained, but the creditor may claim the capital by opposition, *afin de conserver*. Decided in the case of *Thibaudeau* vs. *Raymond*, et al., No. 447 of 1821, in the Court of King's Bench, at Québec; proceeding by opposition *afin de charge* optional with holder of rente, Con. Stats. Lower Canada, cap. 50, sec. 7.

entitled: "An act respecting licitations." One of the charges contained in the list of charges, subject to which the said real estate was so sold, was, "the payment to the legal represen-" tatives of John Coffin, on the 20th day of October, of each " and every year, of an annual constituted rent of £10." The Appellant, as curator to the estate of John Coffin, conceiving that it would be for the advantage of the parties for whom he acted to receive the capital represented by the rent, rather than that the rent should be continued, filed an opposition *afin de conserver*, claiming the capital out of the proceeds of the sale of the real estate. The opposition thus filed by Opposant has been contested on the part of Plaintiffs, on the ground that the sale was made subject to the payment of the rent in favor of Opposant; and therefore that he cannot now claim the capital of the rent out of the proceeds of the sale. On the part of Opposant it is contended that the capital of a *rente constituée* becomes exigible whenever the property hypothecated for it is sold by *décret* that the effect of a *décret* having been given by the Con. Stat. L. C., Cap. 48, Sec. 5, to a sale by a forced licitation, the Opposant must, under the licitation, have the right to exact the capital, in the same way that he could have done, had the said property been sold by *décret*. As a general rule, it is plain that, where real estate is sold by *décret*, the holders of hypothecary claims upon such real estate, are entitled to claim their capital, even although it would not otherwise have been then exigible; the reason being, that as the *décret* extinguishes all hypothecs upon the property sold, the persons whose claims upon the property are extinguished against their will, must be allowed to enforce their claims upon the monies produced by the *décret*. But, where a licitation is so conducted as not to defeat, or impair in any way, a particular hypothec, I do not see any reason for saying that the holder of that hypothec should, in consequence of such a licitation, acquire an important right, which he would not otherwise have had. For instance, in the present case, the heirs of Mary Innis, being the owners of a small property, which did not admit of partition, were obliged to resort to a sale by licitation. The property thus sold is subject to a constituted rent of £10, in favor of the estate of John Coffin, represented by Appellant: it is admitted that, in consequence of the capital of the rent not being exigible, the rent is not worth more than one half of the capital sum it represents; but it is nevertheless contended, that the owners of the real estate, could not dispose of it by licitation, without paying the full amount of the capital represented by the rent. The pretension of Appellant in effect amounts to this, that the owners of the property in

question could not dispose of it by licitation, without paying £166, 13, 4 to extinguish a charge admitted not to be worth more than £83, 6, 8. The Appellant has referred to a number of authorities in support of his pretension ; but these authorities seem to me to refer to the case of a creditor whose hypothecary claim has been extinguished by a *décret* : and not to the case of a creditor whose hypothec has been preserved by such *décret*. The Appellant however seems to think that he has reason to complain of the arrangement made for the preservation of his rent ; and he speaks of that arrangement as an attempt to defraud him of a right, but I cannot view the proceedings complained of in that light. According to my view of the matter, Appellant, under the contract creating the rent, had a right to receive a certain sum per annum, nothing more ; and, so long as that sum is regularly paid and that the security for the payment of it is not impaired, I think Appellant has no cause of complain. The foregoing observations were written before I had seen the opinion of Loyseau on this subject, which is in the following words : " Puis donc que " la vraie raison pourquoi l'adjudicataire est tenu de racquit- " ter la constituée, est à cause de l'intérêt du propriétaire, il " s'ensuit que (si) le propriétaire veut quitter et remettre cet " intérêt, et, afin que son héritage soit mieux vendu, il veut " faire ordonner qu'il sera vendu à la charge de payer et " continuer la rente constituée, consentant d'y demeurer " toujours obligé envers le créancier, *je ne doute nullement* " *que cela ne lui doive être accordé.* Car le créancier n'a " aucun lieu d'insister au racquit, *contre la nature des rentes* " *constituées*, et n'a aucun intérêt que l'adjudication soit ainsi " faite parce qu'il aura désormais deux obligés pour un ; et " qu'outre l'hypothèque qu'il avait sur l'héritage, il l'aura encore " sur tous les autres biens de l'adjudicataire. Et bien que jus- " qu'ici cela ne se soit point pratiqué, j'estime que ce n'est que " faute de s'en être advisé ; or on ne s'en est pas advisé faute " d'avoir pris garde de près à la cause de ce racquit forcé." The learned counsel for Appellant, in his printed case, refers to the fact that the *rente* is not " worth more than half the amount " of the capital it represents, as strengthening his case ; but the matter is not so regarded by Loyseau. In the continuation of the passage, from which I quote, that author says : " Mais " principalement à présent que l'argent est rare, et que plu- " sieurs enchériroient volontiers à plus haut prix les héritages " qu'on décrète, s'ils pensaient d'être quittes de faire rentes de " leurs adjudications : j'estime que c'est un bon expédient pour " les pauvres débiteurs, afin de faire mieux vendre leurs héri- " tages, de présenter requeste à ce que les adjudicataires

" fussent reçus à continuer les rentes &., &." (1) It is obvious that a proceeding, such as suggested by Loyseau might reasonably be objected to by a creditor having a hypothec prior in date to the *rente constituée* sought to be continued ; but, in this case, no question of that kind presents itself, and I allude to the point merely with a view to show that there may be cases to which the passage above cited from Loyseau might not be applicable. In so far, however, as regards the present case, the opinion of Loyseau seems to be so much in point, that had I seen it before putting my own views in writing, I would probably have contented myself with a simple reference to it. I shall merely add, as to this part of the case, that, in forming my opinion as to it, I have not lost sight of the *Arrêt* of the 23rd January, 1738, reported by Lacombe ; (2) which certainly supports the pretensions of Appellant. It may however be observed that the facts of the case, in which that *arrêt* was rendered, are not given by Lacombe ; and being, as that, *arrêt* is, unsupported by reasons and opposed to the opinion of Loyseau, I cannot regard it as binding on us. There still remains one point in this case which I desire to notice ; it is the pretension on the part of Appellant that, under the deed creating the constituted rent in question, he had certain rights tending to secure the payment of that rent, which were not reserved to him by the licitation, and, therefore, that he was entitled to exact the capital representing his rent. As these rights are not referred to in the reasons of appeal, or in Appellant's factum, it may reasonably be assumed that they are not of any great value. But, be their value, or importance, what it may, Appellant did not, in the court below, either by his opposition, or by his answer to the peremptory exception of Respondents, allege that he had any rights such as those referred to in the argument before us ; and it is sufficiently plain that Appellant cannot derive any advantage, in this court, from a right the existence of which was not alleged in any of the pleadings in the court below. Upon the whole, therefore, I am of opinion that the judgment of the Superior Court ought to be confirmed

MONDELET, Justice : It is plain, that the *licitation* has in no way impaired the rights which Appellant claims of the *rente constituée* of £10, in his capacity of *curator*. the *licitation* being had subject to such *rente constituée*, there can be no foundation for obtaining, on the proceeds of the sale of the immoveable sold, and upon which rests that *rente constituée*, the capital thereof. As long as the *rente* is paid regularly, he has nothing to say. The authorities cited by Appellant have

(1) Loyseau, de l'*Action hypothécaire*, Liv. 3, c. 9 Nos 6, 7, p. 109.

(2) Lacombe, *Rec. de Jur.*, verbo Décret, No 13.

no bearing whatever upon the present question, they refer to the *décret*, and the extinction of the *hypothèque*, which is not the case here, the *hypothèque* in the present case being secured for the *rente constituée*. I am, therefore, of opinion that the judgment of the court below should be confirmed.

Judgment confirmed. (12 *D. T. B. C.*, p. 194 et 13 *D. T. B. C.*, p. 97.)

MONTIZAMBERT, for Appellant.

STUART and MURPHY, for Respondents.

APPEL.—PROTONOTAIRE.—ACTION POUR LOYER.

QUEEN'S BENCH, APPEL SIDE, Montreal, 9 décembre, 1862.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

WAGGONER, Appellant, *and* RICKER, et al., Respondents.

Jugé: 1° Qu'il peut être interjeté un seul appel du jugement principal et des jugements sur deux oppositions dans la même cause. (1)

2° Qu'un jugement par défaut, en vacance, peut être rendu par un député protonotaire. (2)

3° Qu'une action seulement pour recouvrement de loyers échus ne tombe pas sous l'opération du Statut concernant les locateurs et locataires, mais doit être poursuivie suivant le cours ordinaire. (3)

This was an appeal from three separate and distinct judgments rendered in the Superior Court for the district of Ottawa, after the following proceedings. On the first day of August, 1861, Respondents instituted an action for £60, balance due them, by Appellant, for rent of certain property; default having been recorded against Appellant, and the case inscribed for judgment, judgment was rendered in favor of Respondents by the deputy prothonotary in the absence of the resident Judge. On the 19th August, Appellant filed two separate and different oppositions to the judgment. By the first of these oppositions, he set forth: That the judgment of the 3rd of August and all the proceedings of Respondents were erroneous and illegal, and should be annulled, because, by the Act, chapter 30, Consolidated Statutes, the act under which the original action was brought, an action for rent due, could only be exercised in conjunction with an action to rescind the lease or recover possession of the property leased, that Respondents' action was not to that effect, and the depu-

(1) V. art. 1115, C. P. C.

(2) V. art. 89, 90, et 91, C. P. C.

(3) V. art. 887, C. P. C.

ty prothonotary had no power to render the judgment. The Appellant therein prayed that the judgment and the proceedings should be annulled and set aside, and the action dismissed. By the second opposition, Appellant, after setting forth divers of the conditions of his lease from Respondents detailed divers expenses and accounts he had made and paid for the property leased, and alleged that the debt claimed by Plaintiffs in virtue of the judgment of the 3rd August, 1861, was extinguished by compensation, and he prayed that the judgment and proceedings should be set aside, and the demand of Respondents declared, for the causes set forth, paid, compensated and extinguished, with reserve of the amount above the claim of Respondents. Both oppositions were contested by Respondents by two separate pleadings. To the first, they pleaded a contestation in law and a *défense au fond en fait.* To the second, a similar contestation in law, and a plea to the merits. Both the oppositions were disposed of upon the answers in law, which were as follows: "That the judgment rendered on the 3rd August, 1861, is well founded and sufficient in law; and the deputy prothonotary had legal jurisdiction over the matters adjudicated upon by him in and by the judgment. That the action was instituted under the lessors and lessees' acts and adjudicated upon by the deputy prothonotary. in the absence of the Hon. Aimé Lafontaine, Judge, Superior Court, district of Ottawa, *and, as such judgment is final* and cannot be set aside by way of opposition, or in the manner set forth in the opposition of Opposant, that opposition is insufficient in law." The issues were raised on both oppositions by separate answers, replications, *articulations de faits* and answers thereto, reiterating the pretensions of the parties. Both oppositions were fixed by two separate inscriptions for hearing on the law issues, and the parties having been heard on each issues, the 21st August, 1861, the resident Judge rendered two separate judgments, dismissing each of the oppositions of Appellant. From these three judgments an appeal was instituted under one writ. The Respondents sought, at first, by motions, to have Appellant *opter* from which judgment he intended to appeal. But this motion was dismissed on the 7th December, 1861. Nevertheless, they persisted in putting in question the validity of such an appeal by their answers to the reasons of Appeal, and, at the hearing of the cause. McCord, for Appellant, argued that the two judgments of the 21st of August, 1861, dismissing his oppositions, could not be sustained; that the deputy prothonotary could not legally render any judgment whatever, except under the 113th section of the act which limits his power to the mere "drawing up" of a judgment, "which shall be held to

"be the judgment of the court, and shall be recorded and "executed accordingly, *subject to the provisions hereinafter* "*made*;" that these provisions clearly enacted that such a judgment was not final; that such judgment was a mere ministerial act; that the deputy prothonotary could have no judicial power whatever; and that the 21st sec. of chap. 78, of the Con. Stats: L. C. (p. 672), in allowing prothonotaries to appoint deputies to perform all the duties *of the office*, never contemplated giving these officers the power to appoint judges. As to the judgment of the deputy prothonotary, it was evidently bad, under whatever authority he might be supposed to have acted; for, supposing that he acted under the lessors and lessees act, and sec. 113 of chap. 83, he had no right to draw up a judgment for rent alone, and moreover no legal default had been obtained against Appellant, because, being a resident of Upper Canada, he was entitled, under sec. 63 of chap. 83, Con. Stats., to at least ten days delay between service and appearance; supposing that he acted independently of the lessors and lessees act, but still under sec. 113 of chap. 83, then Appellant was doubly entitled to the ten days delay, viz: under sec. 63 of chap. 83, and under sec. 8 of the same chapter; and supposing lastly, that his judgment was final, *i.e*, that he acted in the matter judicially, with such powers as are given to a judge under the lessors and lessees act, it was still illegal, owing to the want of delay between the service and the return, owing to want of jurisdiction under the act to adjudicate upon a *demande* for rent alone, and furthermore because the delays required by the act, between the default and the inscription, had not been observed.

AYLEN, for Respondents: The Respondents submit three questions to be solved: 1st. Can three separate and distinct judgments, the first rendered in the original action, and the two others dismissing two certain oppositions to that judgment, and each judgment a final judgment, be reviewed and the validity or legality of all, be at the same time, by the same appeal, tested? 2nd. were the proceedings and judgment in the original action correct and legal, and had the deputy prothonotary power to render such judgment? 3rd. was such judgment a final judgment, and could the same be attacked, and its reversal be pronounced, by judgment of the same court, upon oppositions thereto filed? There can be no question that each of these three judgments were final, and decided separate, different, and distinct issues raised by the parties. By his writ of appeal, issued on fiat, Appellant qualifies the judgment of the 3rd August, as final. The others of necessity, not being interlocutory, were each final. The deputy prothonotary rendered a judgment in the original action,

under the authority of the Statute. An appeal lies to this court from any judgment rendered by the Superior Court, and an appeal from the three judgments in question at one and the same time, and by the same writ of appeal, and appeal, could no more be sanctioned by this tribunal than one appeal brought to question and review three judgments, one on an original action, a second on an opposition *afin de distraire*, and the third on the contestation of a report of distribution, the two last arising from the original suit. The proceedings and judgment in the original action, it is contended, were correct and legal, and the deputy prothonotary had power and authority to render such judgment. The action was taken under the lessors and lessees act (chapter 40, Cons. Stat., Lower Canada,) and only one clear day allowed between the service of summons and the return of the suit, the legal proceeding according to the act. This statute, after detailing the rights of the lessor, enacts at section seven, as follows: "It shall be competent for the court or judge, as the case may be, to hear and determine all cases arising under this act, or growing out of the relation of lessor and lessee, and award costs and every process necessary to enforce judgment." The *demande* and original action arose and grew out of the relation of lessor and lessee. The amount of rent due and claimed is admitted to be correct by the second opposition. The resident judge was absent, and, by chapter 78, con. stats. sec. 24, the prothonotary of the Superior Court for the district of Ottawa was bound to perform all the duties the resident judge could by law perform out of term. The deputy prothonotary, by virtue of the 21st sect. § 2, of ch. 78, cons. stats. Lower Canada, in the absence of the said prothonotary, had power to perform all the duties of the office and to render the judgment of the 3rd August, 1861. A judgment under the act mentioned is final, and could not be attacked by way of opposition. The Appellant, if aggrieved, had his remedy by an appeal to this tribunal. The only case in which the law allows an opposition to be filed to contest a judgment and question its validity, is wherein judgment has been rendered in vacation under ch. 83 of the statutes. The present original action did not proceed at commun law on an authentic document under that act. No doubt Appellant, although summoned to appear and answer according to the provisions of the lessors and lessees act, considered that it did, and that he rightly proceeded by opposition; but why file two different and separate oppositions? It may here be remarked that the affidavits annexed to each opposition are faulty and not according to law. No opposition can be filed to a judgment rendered under the lessors and lessees act. This fact, apart from each

judgment being in itself final sufficiently demonstrate the illegality of each opposition that the contestation thereof were each founded, and the two judgments thereon valid and legal.

MONDELET, Justice, *dissenting :* I am clearly of opinion that the deputy prothonotary had no jurisdiction to render the judgments which are now appealed from. Judicial attributions cannot be delegated, unless the law itself, as in the case of the prothonotary, has decreed that such judicial functions might, in certain cases of urgency, be exercised by such prothonotary. It appears to me perfectly plain that the sections of the law which have reference to certain powers which deputy prothonotaries have and may exercise in the absence of the prothonotaries, are none others but those which pertain to the ministerial part of the office, or rather to the ordinary business of the office of the prothonotary. If it were otherwise, it might happen that in consequence of the power which the prothonotary has of appointing several deputies, there would be as many judges. One might be a yeoman, the second a miller, and the third a baker, a pretty set of judges, truly. The thing is simply ridiculous, apart of its being out of the question, in a legal point of view. In support of my opinion, I refer to the various sections of the law, which are so plain as not to leave a reasonable doubt as to the entire absence of jurisdiction in the deputy prothonotary. I am, therefore, of opinion that the whole is null, and should be set aside. I forbear saying anything touching the other points, the above being in my opinion decisive.

BERTHELOT, juge, *dissentiente :* L'action en cour de première instance était intentée devant la Cour Supérieure, siégeant à Aylmer, pour loyers en vertu d'un bail par écrit, et rapportée en vacance le 3 août, 1861, contre un résident à Ottawa, Haut-Canada, à qui la signification fut faite le 1er août. Le 3 août, les Demandeurs (Intimés) obtinrent un certificat de défaut, et sur inscription ont obtenu jugement pour £60, le même jour. Ce jugement fut rendu par le député protonotaire du district d'Ottawa, en l'absence de l'Hon. Aimé Lafontaine, Juge de la Cour Supérieure pour le district d'Ottawa. Le 19 août, l'Appelant (Défendeur) a produit deux oppositions. Par la première, il prétend que les Intimés Demandeurs ne pouvaient pas poursuivre pour loyers seulement, en vertu des dispositions de l'acte des locateurs et locataires, ch. 40, des Statuts Refondus, qui est le statut en vertu duquel l'action procède. La seconde opposition est au mérite de l'action, et toutes deux sont fondées, en présumant et traitant ce jugement du 3 août, 1861, comme un jugement rendu par le protonotaire en vertu des sections 113, 114 et 115 du ch. 83 des Statuts Refondus, qu'il pouvait attaquer par opposition

ainsi qu'il est prescrit par les sections 116 et suivantes du même Statut. (1) Ces deux oppositions ayant été contestées, furent déboutées sur défense et audition en droit, par l'Honorable Juge A. Lafontaine, siégeant en vacance, le 21 août 1861. L'Appelant a fait émaner un writ d'appel, se plaignant du mal jugé de ces trois jugements du 3 août, sur l'action, et du 21 août, sur les deux oppositions. Les Intimés se sont plaint de ce qu'il n'y avait eu qu'un seul writ d'appel d'émané pour se plaindre des trois jugements, mais il ne paraît pas qu'ils avaient raison de le faire. L'Appelant n'avait guère pu faire autrement puisqu'il attaquait les trois jugements par la demande d'un writ faite le même jour. Les Intimés auraient eu raison de se plaindre si l'Appelant avait multiplié les frais en prenant deux ou trois writs d'appel, ce qu'il aurait pu peut-être faire, à strictement parler. Que l'Appelant ait raison d'attaquer le jugement du 3 août, 1861, il ne peut y avoir guère de doute pour deux raisons : 1o. Parce que le délai d'assignation était insuffisant contre un résident dans le Haut-Canada, suivant la section 63 du ch : 83 des Statuts Refondus, B. C., p. 723 ; 2o. Parce que, suivant la section 1ère du ch. 40, ci-dessus cité, les Demandeurs ne pouvaient, par la sous section sixième, poursuivre pour loyers seulement, sans que cette demande fut jointe à une demande en résiliation de bail, résultant des cas prévus aux sous-sections, nos. 1, 2, 3, 4 et 5, de la dite première section. L'Appelant n'a pas raison de regarder ce jugement du 3 août, comme pouvant être attaqué par opposition, aux termes des sections 116 et suivantes du ch. 83, et ce n'est pas le cas d'en faire l'application à une poursuite intentée sous les dispositions du ch. 40, ci-dessus cité. Si le jugement du 3 août, avait été rendu, après assignation suffisante, par le protonotaire, c'était un jugement final qui ne pouvait être attaqué que par appel. Mais l'Appelant a raison, suivant moi, de prétendre que le député du protonotaire n'avait pas le droit d'agir judiciairement en l'absence du Juge ou du protonotaire. Par la 19ème Vic., ch. 55, sec. 3, ou ch. 78, sec. 24, des Stat. Ref. B.-C., la législature a donné au protonotaire des pouvoirs d'une nature judiciaire, au cas *d'absence* ou de *maladie* des Juges résidents dans les districts nouveaux (autres que Québec et Montréal). Elle pourvoyait ainsi à des cas de nécessité auxquels la nouvelle organisation judiciaire n'avait pas autrement ou suffisamment pourvu. Elle n'a pas voulu aller plus loin pour ces actes judiciaires proprement dits, dans ces cas spéciaux de maladie ou d'absence du Juge pour lesquels elle pourvoyait tout spécialement, en faisant du protonotaire un Juge. Entre autres preuves l'on

(1) Voir 22 Vic., Cap. 5, Secs. 11 et 13, aussi 23 Vic., Cap. 57, Secs. 43, 47.

peut en induire celle qui résulte de ce que, par la section 23 du Ch. 83 des Stats. Refon. B.-C. la législature a donné aux Juges et aux protonotaires, indistinctement ou conjointement le droit de remplir plusieurs fonctions d'une nature judiciaire, relativement à la preuve des testaments, requêtes pour nomination de tuteurs et curateurs, et ce d'une manière illimitée et sans restriction au cas de maladie ou d'absence du juge. Par le premier des actes ci-dessus cités, le protonotaire n'est revêtu de l'autorité du Juge que dans les cas de nécessité, par le second il a des pouvoirs judiciaires concurremment avec les Juges, sans distinction. Il est vrai que, par la sec. 136, 20, Vic. ch. 44, qui est reproduite par la sec. 7 du ch. 82, de Stats. Refon. B.-C. p. 706, il est statué que les officiers publics y nommés, et entre autres le protonotaire, " *ou autre officier ministériel de justice,* pourra se nommer *un ou plusieurs députés* pour la dépêche des affaires de son bureau. Mais il ne résulte nullement des termes de cette section, ou de l'ensemble de l'acte, ou de tout autre acte de judicature, que ce ou ces députés du protonotaire (officier ministériel de justice) pourraient devenir des Juges en *certains cas ou en cas* d'absence ou de maladie du Juge, tel que ci-dessus mentionné ; et c'est bien en vain, selon moi, que l'on croit sortir de la difficulté en ayant recours à l'acte d'interprétation, ch. 5, Stats. Refon. B. C. sect. 6, n° 23, p. 31. " Les mots par lesquels il est donné " ordre ou pouvoir à un officier ou fonctionnaire public de " faire un acte ou chose; ou qui s'applique à lui de toute autre " manière, *sous son titre officiel,* comprendront ses successeurs " en office, ou son ou ses députés légaux." Il me semble résulter clairement des termes de cette clause deux choses. 1° Que ces officiers ou fonctionnaires publics étaient autorisés par la législature à se nommer des députés pour ce qui était de leurs devoirs ministériels, ou d'un caractère ministériel, et aussi l'on se sert des mots " *ou autre officier ministériel de justice* " ce qui qualifie et restreint le sens qu'il faut donner à cette clause, et à ce qu'elle a pu statuer quant aux pouvoirs que le protonopourrait déléguer. Je maintiens que lorsque le protonotaire agit comme Juge en vertu de la clause 24 du ch. 78, Stats. Refon. B.-C. il n'agit plus comme protonotaire, mais comme Juge, et que, par conséquent, la section ci-dessus citée de l'acte d'interprétation ne peut avoir l'application qu'on veut lui donner. Et depuis quand un juge peut-il se nommer un député ou déléguer ses fonctions de Juge, à moins que la loi lui en donne le pouvoir directement et positivement ? La nomination des Juges et leurs pouvoirs ne leur sont pas accordés par induction ou supposition. Cest un droit qui appartient, et qui émane de l'autorité souveraine directement mais qui ne peut jamais se déléguer hors le cas d'une disposition légale, for-

melle et directe, et je ne vois rien de cela dans l'argument que l'on fait en invoquant l'acte d'interprétation de 1848, que l'on ferait s'appliquer à une disposition légale d'une espèce toute particulière et extraordinaire du droit anglais et du droit français. c'est-à-dire, lorsque la législature a fait des Juges de certains protonotaires, en certains cas prévus : chose qu'elle n'a peut-être ainsi faite que parce qu'elle croyait voir une protection suffisante pour le public par le choix des protonotaires dont la nomination appartient à l'exécutif, tandis que les députés ne tirent pas leur autorité du Souverain, mais seulement des protonotaires, et sans être tenus par les mêmes serments ou cautionnements. Pour faire voir un des inconvénients qu'il y aurait à voir les députés-protonotaires devenir des Juges, en cas d'absence ou de maladie de ces derniers, je pourrais supposer le cas d'un étudiant, député du protonotaire, devenu juge par le cas, et qui aurait à procéder à l'interdiction du Conseiller Législatif de la division électorale, du membre du comté,ou encore du curé ou du ministre de l'endroit. Il suffit de démontrer ainsi toute l'étrangeté d'un pareil état de chose pour dire que la Législature n'a pas pu vouloir l'établir et le sanctionner. Mais pour mieux faire voir que l'acte d'interprétation ne doit pas décider la question, et qu'il faut chercher ailleurs l'intention de la Législature, je citerai du ch. 80, des Stat. Ref. B. C. " Acte concernant la Cour du Banc de la Reine et les Cours Supérieure et de Circuit dans le district de Gaspé," la sec. 34, reproduisant la Sect. 134, du chap. 44, 20 Vict. (1857,) qui pourvoit spécialement à donner au député shérif à être nommé par le shérif de Gaspé, les pouvoirs *judiciaires* du shérif de Gaspé dans les matières civiles et criminelles qui se rattachent aux Isles de la Magdeleine, ainsi qu'au reste du district de Gaspé. Aussi, Sect. 23 du même chap. 80, qui pourvoit à donner au greffier de la Cour de Circuit des Iles de la Magdeleine, les mêmes pouvoirs que le protonotaire de la Cour Supérieure dans tout autre district. Dans l'un et l'autre cas, la Législature n'a pas cru et n'a pas voulu, que de ce que le shérif et le protonotaire étaient autorisés de se nommer un député ou des députés, pour les remplacer dans leurs fonctions ordinaires, officielles ou ministérielles, ils pussent se nommer un député pour remplir les fonctions judiciaires qui leur étaient conférées au cas d'absence ou de maladie du Juge, ou dans quelqu'autre cas tout spécial comme l'organisation judiciaire nécessitée pour les Isles de la Magdeleine. Non, il ne pouvait en être autrement à moins de confondre et détruire tout ce que l'on peut concevoir de l'importance des fonctions judiciaires. Encore, par le ch. 105, des Stats. Ref. B. C., intitulé : " Acte concernant l'administration prompte et sommaire de la justice criminelle, en certains cas," la Sec. 31, pourvoit

spécialement à donner les pouvoirs du Recorder à deux Juges de Paix, et à tout shérif dans les districts, autres que ceux de Québec et de Montréal, mais spécialement du député shérif du district de Gaspé. Enfin par la Sec. 7e du ch. 106, Stat. Ref. B. C. "Acte concernant le mode de juger et punir les jeunes délinquants," il est pourvu *spécialement* à donner des pouvoirs d'une nature judiciaire au député shérif du district de Gaspé. Dans tous ces actes; la Législature n'a pas cru que, par induction ou supposition, les députés shérifs ou députés protonotaires, pour les fins ministérielles du bureau où ils sont, assumeraient en ces qualités le droit de remplir des fonctions judiciaires proprement dites, et pour lesquelles il peut se nommer un député. L'intention de la Législature est bien manifestée dans les actes ci-dessus cités. Comme je l'ai dit plus haut, quand le protonotaire agit comme Juge, il cesse d'être protonotaire, ses fonctions sont alors différentes de celles qui lui sont ordinaires. Quant aux règles que nous devons suivre en fait d'interprétation de statuts, je réfère à *Dwarris*, édition de 1848, London, chap. 8, Construction of Statutes, pages 552, 556, 564, 567, 573, 577, citing Lord Coke, he says: "For "the best expositors of all acts of Parliament, in all cases, are "the acts of Parliament themselves, by construction and con-"ferring all the parts of them together. All acts of Parlia-"ment shall be taken by a reasonable construction to be "collected out of the words of the acts themselves, according "to the *true intent* and *meaning* of the *makers*." Est-ce que l'on peut supposer raisonnablement pour un instant que l'intention de la Législature a été de conférer, au cas de maladie ou d'absence du Juge, des pouvoirs judiciaires à un député protonotaire qui, bien souvent, dans les nouveaux districts, n'a aucune connaissance des lois, ainsi que je l'ai vu dans un ou deux cas. Je regrette d'être obligé de différer du jugement sur ce point; j'aurais été plus loin que la majorité de la Cour en infirmant le jugement du 3 août, comme étant rendu par une personne incompétente; mais je devais donner mon dissentiment au long afin de mettre en garde le barreau, les protonotaires et le public, contre les inconvénients graves qui pourront en résulter, si l'on persiste dans ce que je crois être une fausse et une mauvaise interprétation. Je devais encore énoncer mon sentiment et prononcer sur ce point puisque c'était un des moyens invoqués formellement par l'Appelant, tant dans son factum qu'à l'argument.

DUVAL, Juge: Je ne crois pas qu'il puisse résulter de dangers de la nomination comme député greffier d'un cultivateur, d'un meunier, ou d'un boulanger, car je ne pense pas que le gouvernement confierait la charge importante de greffier à des hommes capables de déléguer leurs pouvoirs à des personnes

aussi ignorantes. Cependant, j'avoue que l'exercice de cette faculté offre des dangers. Quoi qu'il en soit, la Législature ayant jugé convenable de faire un juge du greffier, et, en son absence, du député greffier, nous devons obéir à la loi et la faire exécuter telle que nous la trouvons. Ce ne sera pas le premier cas d'une loi absurde, appliquée par les tribunaux ; exemple, la loi concernant l'adjudicataire. Toutefois que les protonotaires ne s'imaginent pas, par exemple, qu'ils ont le droit de courir la campagne et de s'en fier entièrement pour l'accomplissement de leurs fonctions comprenant des pouvoirs judiciaires importants, aux députés qu'il leur plaira de nommer. S'ils le font, c'est aux parties intéressées de se plaindre, pour demander un amendement à la loi, amendement que la Législature ne pourrait refuser, surtout après l'expérience d'aussi graves inconvénients. En attendant, la loi quelque défectueuse qu'elle soit, doit avoir son cours.

AYLWIN, Justice: The Legislature ought to do away with the law, or otherwise do away with the clause that no man shall be appointed a Judge unless he is a practising barrister of ten years standing.

MEREDITH, Justice: This case brings under our consideration the judgment of the deputy prothonotary, on the original demand of Plaintiffs, and also the judgment of the learned Judge of the Superior Court on the oppositions filed by the Defendant. to the judgment so rendered by the deputy prothonotary. Whether the original action be considered as brought under the common law, or under the lessors and lessees act, it appears to me that the delay of one day between the service of the writ, and the day of the return of the writ was too short. It is true that by the 18 Vic., cap. 108, sec. 11. (Con. Stats. L. C., p. 404,) a delay of one day between the service and return of a writ issued under the lessors and lessees act, is sufficient, if the service be made within five leagues of the court house where Defendant is required to appear. But at the time of the passing of this provision of law, no service of process, such as it contemplates, could be made in Upper Canada. Since that time, by the 22 Vict., cap. 5, sec. 58, (Con. Stats. L. C., p. 724,) service has been allowed to be made in Upper Canada of writs issuing in Lower Canada; but one of the provisions of the section last cited requires that in every case of such service of a writ issuing from the Superior Court, there shall be a delay of at least ten days, between the day of the service and the day of the return of the writ; and, as the statute makes no exception in favour of writs issuing under the lessors and lessees act, I apprehend that we must set aside the judgment of the deputy prothonotary on the ground that the delay between the service and return of

the writ was insufficient. It was contended on the part of Appellant that the deputy prothonotary at Aylmer, had no power in vacation and during the absence of the Judge, to render the judgment complained of; but upon that point I am against Appellant. The writ in this cause issued, as is mentioned on the face of it, under the lessors and lessees act; a Judge could therefore, beyond doubt, have rendered judgment in the case in vacation. By the sec. 24 of cap. 78, Con. Stats. L. C., p. 673, in the absence of the Judge the prothonotary at Aylmer (there being no president of the General or Quarter Sessions of the Peace in that district) is required to perform "*all the duties* which the resident Judge *can by law perform out of Term;* one of those duties being that of rendering judgment in cases under the lessors and lessees act in vacation. By the 20 Vict., cap. 44, sec. 136; cap. 82, Sec. 7, p, 695, of Con. Stats. L. C., it is in effect declared that every prothonotary or clerk of any Court may, and shall, when necessary for the despatch of the business of his office appoint one or more deputies. And by the interpretation act Cap. 5, Con. Stats. C., sec. 6, no 23, it is declared that "words directing or empowering a public officer or "functionary to do *any act or thing*, or otherwise applying "to him by his name of office shall include his successor in "such office *and his or their lawful deputy.*" Under the foregoing provisions of law it appears to me that, in the absence of the Judge, the prothonotary at Aylmer had power to render judgment in vacation, under the lessors and lessees act, in the case before us; and that the deputy of the prothonotary under the provisions of the interpretation act, has exactly the same powers as the prothonotary himself. It has been said, on the part of Appellant, that judicial powers cannot be delegated. That principle I readily admit: but I cannot see that it has any application in the present case; because the powers of the deputy prothonotary, whatever may be their extent, are vested in him by law. By the interpretation act, the words "*prothonotary* of the Superior Court *shall perform* ALL the "duties which the resident Judge can perform out of Term" are to be read as if the Legislature had expressly said "the "prothonotary of the Superior Court, *or* his *lawful deputy* "*shall* perform all the duties which the resident Judge can "by law perform out of Term" and if that provision of law were so worded, I presume the case would not be considered as admitting of a doubt. It has also been contended that, although the deputy prothonotary may discharge the ordinary duties, yet that he cannot discharge the judicial duties of his principal. I cannot however see any grounds for this distinction. The interpretation act in terms perfectly plain declares that "ANY ACT OR THING" that may be done by a public offi-

cer, may be also done by his *lawful deputy*. We have no power to except from the general words "*any act or thing*" acts of a judicial nature. To do so would be to make a distinction which the law has not made, and which, therefore, we have no power to make. I now pass to the consideration of the appeal from the judgments upon the oppositions. The Appellant says that assuming, as he had a right to do, "that this judgment" [the judgment of the deputy prothonotary on the original demand] "had been rendered under sec. 113 "of cap. 83, of the Con. Stats. of L. C. p. 742, he filed op-"positions to the same under the 116th and subsequent sec-"tions of the said act." The Appellant in this respect was under an erroneous impression. Upon the face of the writ Defendant (now Appellant) was required to appear and answer to Plaintiff according to the provisions "of Cap. 40 "of the Consolidated Statutes of Lower Canada being an "act respecting Lessors and Lessees." The judgment of the deputy prothonotary must therefore be considered as having been rendered under the Lessors and Lessees act, and a judgment under that Act cannot be attacked (as according to the statement of Appellant he attempted) "by oppositions under the 116th and subsequent sections of said act, namely Cap. 83. of the Con. Stats. L. C.; I am therefore of opinion that the judgment of the learned Judge of the Superior Court rejecting the said oppositions ought to be maintained. Under all the circumstances of the case, as Appellant succeeds as to the principal judgment, and fails as to the other two, I think the parties ought to pay their own costs respectively in this court.

"The Court, considering that the delay between the service of the process in this cause issued and the day of the return thereof, was insufficient in law to entitle Plaintiffs in the court below to obtain a default against Defendant by reason of his non appearance and to proceed *ex parte* against Defendant, and that all proceedings thereon taken in the said court by Plaintiffs are irregular, null and void; that, in consequence thereof, no judgment could be legally pronounced by the court against Defendant in favour of Plaintiffs, and, therefore. that the judgment pronounced on the third day of August, 1861, by the deputy prothonotary of the Superior Court for the district of Ottawa, condemning the Defendant to pay to Plaintiffs the sum of £60, with interest and costs, is illegal and ought to be set aside and annulled, this court doth set aside and annul the judgmentpronounced on the third day of August, 1861, by the deputy prothonotary of the Superior Court for the district of Ottawa, and, proceeding to render the judgment which the Superior Court ought to have rendered,

doth declare the delay between the day of service on Defendant of the process *ad Respondendum* issued at the instance of Plaintiffs and the day of the return thereof insufficient in law to enable Plaintiffs to obtain a default against Defendant by reason of his non appearance, and to proceed against the latter *ex parte ;* and doth further declare the judgment pronounced by the Superior Court against Defendant and in favour of Plaintiffs on the said 3rd of August, 1861, irregular and illegal, and doth annul and set aside the same, and dismiss the action of Respondents. And this court, having examined the record and proceedings had on the opposition *afin d'annuler* filed by Appellant, by which Appellant alleges that the deputy prothonotary had no authority to pronounce judgment in the cause, and the judgment thereon pronounced by the said court on the 21st of August 1861 ; considering that the deputy prothonotary was by law authorized to pronounce judgment on the demand of Plaintiffs in the court below against Defendant, pursuant to the statutes in such case made and provided, doth confirm the judgment so pronounced by the Superior Court on the 21st day of August, 1861, and doth condemn Appellant to pay to Respondents the costs by him incurred on the said opposition in the court below. And lastly, this court, having examined the record and proceedings had on the second opposition *afin d'annuler* filed in the said court by Appellant, by which Appellant alleges that the debt claimed by Plaintiffs, in virtue of the judgment pronounced by the Superior Court on the 3rd day of August, 1861, as above stated, is extinguished by compensation : Considering that the allegations contained in said opposition are insufficient in law to entitle Opposant to the conclusions of his opposition, or any part thereof, and that, in the judgment pronounced by the Superior Court on the 21st day of August, 1861, dismissing the said opposition with costs, there is no error, doth confirm the said judgment with costs, in the court below. And as to the costs incurred in this court, it is ordered that each party do pay the costs by him incurred on the present appeal. (The Honorable Justice C. Mondelet and Berthelot dissenting.) (13 *D. T. B. C.*, p. 102.)

McCORD and COLEMAN, for Appellant.

AYLEN and PERKINS, for Respondents.

ACTION EN BORNAGE.—PRESCRIPTION.

PRIVY COUNCIL, 8 March, 1867.

Présent: Sir WILLIAM ERLE, Sir JAMES WILLIAM COLVILE, Sir EDWARD VAUGHAN WILLIAMS, and Sir RICHARD TORIN KINDERSLEY.

On appeal from the Court of Queen's Bench for Lower Canada (Appeal Side.)

DANIEL HERRICK, Appellant: and GARRET SIXBY, Respondent.

Action *en bornage* to ascertain the boundary line between the contiguous properties of the Plaintiff and Defendant, which property was formely one lot, and described as containing between 140 or 150 acres. This was afterwards sold in two lots. Plaintiff's the eastern portion, was described in the deeds as containing "ninety acres, more or less." Defendants' western portion, "about fifty acres;" but the descriptions in the deeds did not agree as to the way the line of boundary was to run. The effect of a surveyer's report, which the Court in Canada homologated, was to make a boundary line, by which Defendant got sixty one acres, and reduced the Plaintiff's to eighty-two acres. Upon appeal, held (reversing the decres of the Superior Court and the Court of Queen's Bench) that those Courts were wrong in their construction of the deeds and evidence as to the boundaries, the rules being that, if in a deed conveying land, the description of the land intended to be conveyed is couched in such ambiguous terms, that it is very doubtful what was intended to be bounderies of the land, and the language of the description equally admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making the quantity altogether different, the former construction must prevail.

Held: Further, that the case differed from a conveyance of a certain ascertained piece of land accurately described by its boundaries on all sides, with the statement that it contained so many acres," or thereabouts," when, if the quantity was inaccurately stated, it did not affect the transaction. By the law of Lower Canada the term of prescription is thirty years.

To sustain a plea of prescription, the evidence must show peaceable uninterrupted possession and ownership for upwards of thirty years.

This was an action en bornage, brought by Appellant against Respondent in the Superior Court for the District of Montreal, to ascertain the boundary line between contiguous pieces of land of Appellant and Respondent, which land originally belonged to the same owner, and formed together a certain parcel of ground, described in the deeds of both Appellant and Respondent as Lot No. 3, which lot was said to contain between 140 and 150 acres, and described as bounded on the south by the boundary line, along the 45th parallel of latitude, between Canada and Vermont, on the north by a line parallel to the last mentioned line, and on the east and west by lines perpendicular thereto. The whole Lot formed a

rectangular block, and there was no difference between the parties as to its original boundaries or area, the question being the boundaries after the division. The western portion of lot No. 3 was sold in the year 1813 to Respondent's predecessor in title, as "about fifty acres of land." The eastern portion of Lot No. 3 was sold in 1845 to Appellant's predecessor in title, and was described as containing "ninety acres more or less." It was agreed between the parties that a hemlock stump, referred to in the deeds of Respondent, and still existing in the line of the southern boundary of Lot No. 3, was the point from which the boundary line between the properties of Appellant and Respondent was to start. The question was in what direction it was to run. Appellant contended that it should run parallel with the eastern and western, and perpendicular to the northern and southern boundaries of Lot No. 5, so as to give each party a rectangular block of land. This would have given Respondent about fifty-one acres, the quantity conveyed by the deed being "about fifty acres," and Appellant little over ninety acres, the quantity mentioned in his deed. Respondent, or the other hand, contended that the boundary line ought to run in a zigzag line towards the north-east; which would give him eighty-two acres instead of "about fifty acres," as conveyed by his deed, and Appellant sixty-two, instead of "ninety acres," as conveyed by his deed. From a plan referred to in the Court below, there appeared to be a ledge of rocks running north-east from the hemlock stump, a short distance to the east of a brook flowing into the Rock River. Respondent claimed that his boundary should run at the base of this ledge of rocks. The facts were these: Early in the present century, John Ruiter owned an estate in the Seigniory of St. Armand, in Lower Canada. Such estate was, at his death, divided among his heirs, in which the portion of one Captain John Ruiter was distinguished as Lot No. 3, and described as containing 140 acres. By a deed, dated the 3rd of March, 1813, Captain Ruiter sold and conveyed a part of that Lot to George and David Krans, brothers, by the following description: "About fifty acres of land, part and parcel of that tract of land situate, lying, and being in the aforesaid Seigniory of St. Armand, known and distinguished by Lot No. 3; the said fifty acres or thereabouts to extend from the westerly boundary line of said Lot and on the whole width thereof, and easterly to the foot of a ledge of rocks which runs across the Lot at a certain distance easterly of a certain brook, which also runs across said Lot, the southerly boundary of which said part of said Lot is a hemlock tree, which stands on the southerly boundary line thereof, marked G. and D. K.

1813." The property so sold ultimately came into the possession of Respondent. By a deed, dated the 15th of August, 1845, the Sheriff of the district of Montreal, under a writ of execution sued out by Abel Houghton against the lands and tenements of George Chapman, sold and conveyed to Abel Houghton a lot of land thus described: "A lot of land situate in the Seigniory of St. Armand, in the district of Montreal being part of Lot No. 3 on a plan of division of the land of the late John Ruiter among the heirs of his estate, containing ninety acres in superficies, more or less; bounded to the south by the Province line, to the west by the remaining part of the said Lot No. 3, owned by Miles Krans, to the north by Miles Krans and James Allan, and to the east by Lot No. 4 on the plan." Houghton sold and conveyed to the Appellant the land comprised in the last mentioned deed, by the same description. Appellant brought the present action against the Respondent in the Superior Court for the District of Montreal, and by the declaration alleged that Respondent occupied his land, or, as Appellant called it, "encroached," praying that the respective lands of the parties might be measured and bounded, at their common expense, by a Surveyor to be agreed on by them, or in default of such agreement to be named by the Court, that a *procès verbal* of such measuring and bounding might be homologated by the Court, if found just, and that Respondent might be condemned to restore to Appellant the profits which he had derived, or might have derived, from his alleged encroachment, to the extent of £150 currency, with costs of suit. Respondent, by his plea, claimed to hold to the ledge of rocks, both by his deeds and by a prescription exceeding thirty years, and averred that Ruiter, the vendor in 1813, did not dispose of Appellant's portion of the lot n° 3 for a long time after he had sold Respondent's portion thereof, and that any title which he might have granted for Appelant's portion was subject to the fulfilment and warranty of the title which he had granted of Respondent's portion and prayed that the respective land of the parties might be measured and bounded at their common expense according to their titles and to the possession and rights of Respondent, and according to the marks, limits, indications, and boundaries defined and marked out by Respondent's titles. Witnesses were examined, whose testimony as to the boundary and uninterrupted user relied on by Respondent was contradictory and conflicting. The judge (the Hon. Mr. SMITH) having heard the case on the merits, ordered *avant faire droit*, that the contiguous properties in question should be measured and bounded by a sworn Surveyor, according to the respective titles of the several parties, and that the

Surveyor should particularly establish and run a line of division between them, adjoining and adjacent to the ledge of rocks, and along the base of the ledge, and should fix and determine the line by proper metes and bounds, and should report to the court accordingly. The Surveyor made his report, which, with a plan thereto annexed, was filed, and by a final judgment pronounced on the 31st of October, 1862, by the Hon. Mr. assistant justice MONK, the Superior Court homologated the report, and determined the boundary between the contiguous properties in question, in accordance with Respondent's contention. Appellant appealed to the Court of Queen's Bench, which court, on the 1st of March, 1864, by a majority of the judges, affirmed the judgment of the 31st of October, 1862. Here follow the remarks of the judges who rendered the judgment in appeal:

BADGLEY, J: In rendering the judgment in appeal, said: This is an action of *bornage*, which Plaintiff had the right to institute against Defendant for the settlement of a division line to be run and defined by a legal survey between the adjoining properties. The evidence in the case shews that unsuccessfull attemps were made by both parties to establish the line, both admitting the south-east point of departure to be the hemlock tree marked G. & D. K., 1813, but differing as to its north direction; Plaintiff requiring it to be prolonged parallel with the external west boundary of the lot No 3, as shewn on Lay's map; Defendant requiring it to be run along a ledge of rocks described in his titles and entending obliquely across the lot. The contestation thus became petitory, and a reference to the titles of the respectives parties, and to their legal rights of property in relation to their respective portions of the lot, must be had to solve the difficulty. It must be observed, *in limine*, that these portions formed together one lot, the property of captain John Ruiter, and known as lot No 3, shown on said map, drawn for the purpose of the partition of the real estate of the previous John Ruiter amongst his heirs, of whom the said captain John Ruiter was one, and who, by the effect of the partition, became the owner of the entire lot No. 3, and of the adjoining lot No. 4, as shown on the said map. This map shows the lot No. 3 to be an oblong bounded on the west by a straight line running north and south, on the south by the province line, on the east by the lot No 4, and on the north by lot No 2. A brook or rivulet is shown on the map as running across the lot No 3, from north to south, and the lot is market 140 acres in superficies. The partition was effected in 1809. Afterwards, by notarial deed of sale, of 3rd March, 1813, captain John Ruiter sold to George and David Krans, for the block sum of $750, payment whereof

was acknowledged in the deed, " about *fifty acres* of land " situated in the seigniory of St. Armand, aforesaid, known " and distinguished by lot No, 3 ; the said fifty acres, or there- " abouts, to extend *from the westerly boundary line of said* " *lot and across the whole width thereof, and easterly* to the " foot of a ledge of rocks which run across the said lot, at " a certain distance easterly of a certain brook which runs " across the said lot, the *south-easterly* boundary of which " part is a hemlock tree which stands on the southerly boun- " dary line thereof, and is marked " G. & D. K., 1813," with " all buildings and improvements thereon." The sale was made by the vendor for himself, his heirs, assigns, &c., with the usual warranty stipulations against mortgages, evictions, &c., and he subjected the land sold to a share proportional to the contents of the said piece of land of the quit-rent charged upon the whole lot, by the deed of concession from the seignior. The purchasers took possession, and afterwards were succeeded by Miles Krans, who inherited from them the said piece of land sold to them as aforesaid. By notarial deed of 25th Feb., 1846, Miles sold to James S. Allen for £150 the said piece of land which was described in this deed *in ipsissimis verbis* of Captain John's deed to George and David Krans. On the 17th Jan., 1848, Allen sold to Respondent Defendant Sixby, for the sum of £150, the same piece of land under the same description as in the previous deeds, and of which said land Sixby has always since had the possession. The chain of title from the original owner, Captain Ruiter, to Defendant Sixby is thus complete. By the original deed of 1813, George and David Krans, their heirs and assigns, became the owners and proprietors of that portion of the lot No. 3, inclosed within the limits described in that deed, namely, the western part extending up to the eastern boundary named in the deed, and Captain Ruiter and his assigns of the eastern part extending from the said last mentioned boundary. The Appellant's and Plaintiff's titles are, 1st. A deed of sale from the sheriff of the district of Montreal, of the 15th August, 1845, to Abel Houghton, of a lot of land described: " A lot of land situate " in the Seigniory of St. Armand, in the district of Montreal, " being part of lot No. 3 *on a plan of division of the land of* " *the late John Ruiter, among the heirs of his estate. The* " *said plan made by Amos Lay, surveyor, and dated the 6th December*, 1809, containing ninety acres in superficies more " or less, bounded to the south by the province line, to the " west by the remaining part of said lot No. 3, owned by " Miles Krans, to the north by Miles Krans and James Allan, " and to the east by lot No. 4, on said plan, without any " buildings thereon erected." 2nd. Conveyance from Abel

Houghton of this lot to Plaintiff, by notarial deed of 23rd October, 1855. The Appellant and Plaintiff has not produced any title deeds anterior to the sheriff's deed above referred to, which was executed upon an adjudication to Houghton of the lot of land last above described, which had been seized and sold by the sheriff under a writ of *fi. fa. de terris* as in the possession of one Chipman. In this conflict of title, the advantage is manifestly with Respondent, whose title relates back to the original owner through his warranty deed of 3rd March, 1813, to George and David Krans; whilst, on the other hand, Appellant's title reaches only to the sheriff's decree to Houghton in 1845, without showing that Chipman, upon whom it was seized and adjudicated, had any title or right to the property. The piece of land, the Krans' purchase and Respondent's property, is described as inclosed within fixed boundaries plainly described on the four sides, with a south east point of departure for the eastern boundary, as follows: "running north west at the foot or along the foot of "a ledge of rocks which runs across the lot at a distance east "of a certain brook which runs across the said lot." The ledge of rocks and brook being natural boundaries can admit of no dispute, and are shown on the map or plan of division mentioned in the sheriff's deed. The Appellant's piece of land is described "*as bounded to the west by the remaining* "*part of said lot No.* 3 *owned by Miles Krans.*" Now the *adjudicataire* Houghton could not have been misled either about the brook or the ledge of rocks above mentioned, when he effected his purchase they were shown on the plan, and during the four months preceding the *decret*, required by law for the public advertisement of the property, he was informed that the adjoining portion was the property of Miles Krans, during which time he had every opportunity for ascertaining the extent of his intended purchase. If he did not take the necessary precaution before his purchase he can only blame himself, and if he did, and bought a speculative boundary, he must abide by the legal result. In the contestation as it is, Respondent has a right to establish the extent of his land as in a contestation, between the original vendor and vendees, Captain John Ruiter and George and David Krans, as to the extent of their purchase from him. At the outset it may be stated as established, that the vendor himself having fixed and specified the boundaries of the piece of land which he sold for a block sum, could not, by a petitory action merely, without alleging and imputing fraud upon the vendees, deprive them of any portion of the area which he himself had inclosed within his own fixed and specified limits. His deed was perfect, translative of the property from its date,

and passed the land inclosed within those limits for a fixed price *en bloc*, which, moreover, he had received. 1 Bourjon, *Droit commun de la France*, p 476 : Toutes les obscurités qui se trouvent dans le contrat de vente doivent s'interpréter contre le vendeur, parce que connaissant sa chose mieux que l'acheteur, c'est à lui à s'exprimer si clairement qu'il n'y ait aucun doute sur l'étendue de la vente et sur l'effet d'icelle : règle prise dans l'équité et dans la raison écrite adoptée ; (in notis) *quia debuit expertius legem dicere.* L. 3, *de factis*, arrêt of 11 June, 1708, 6 vol. Journ : Again : The excess is by law the loss of the vendor. "Pothier, *Traité de vente*, " No. 254, accorde à l'acheteur le surplus, parce que la clause " indicative de la contenance n'est qu'en faveur de l'acheteur, " c'est le vendeur seul qui promet et s'engage. L'acheteur " par cette clause ne contracte aucun engagement, et par con- " séquent, ne peut être tenu de faire raison du surplus de la " contenance." And, at No. 255, he applies this division to sales *per aversionem*, c'est-à-dire, " où on est convenu d'un seul et unique prix pour tout ce qui était vendu et non tant la mesure." Despeisses, pt. 1, tit. I, sec. 5, No. 15, p. 46, says : " même si en faisant la vente du fonds, le vendeur a fait les " limites plus amples qu'elles ne sont, et qu'après, qu'on évince " une partie de ce qui est compris ès dites limites, quoique le " nombre des arpents exprimés dans la vente s'y trouve, le " vendeur sera tenu de ce qui a été évincé, et cela, non-seule- " ment lorsque la vente a commencé par la quantité, mais " aussi simplement lorsque la vente a commencé par le corps." And at p. 47, " il est juste que le tout soit au profit de l'ache- " teur qui a été induit à acheter à tel prix, etc., etc. S'il con- " tient plus, le vendeur se doit plaindre de lui-même d'avoir " vendu pour tel prix pour le tout." It is manifest that a petitory action for the recovery back of any particular portion of the limited area sold for the fixed price, could not have availed Captain John Ruiter against his vendees, George and David Krans because it must be remembered, that the sale, by Ruiter to the Krans, was a sale *per aversionem* not *tant la mesure ;* a block sum, *tel prix pour le tout*, that is for a specific piece of land marked off within visible limits, in fact *un corps certain.* Now Bourjon says : " lorsque le con- " trat de vente porte à qui tiennent ces corps des quatre côtés, " abstraction est faite de la mesure ; les confins expliqués, qui " forment les limites de l'objet de la vente, prédominent à l'é- " nonciation de la mesure qui n'est que surabondante," and he cites I Henrys Quæst. 83 ; Lapeyrère, Lett. v. p. 258. This principle has also been maintained by a judgment in appeal, in the case of *Labadie* vs. *Truteau*, 3 *R. J. R. Q.*, p. 476, where " the specification of the contents of the lot being al-

" together superfluous in addition to the description given by visible bounds and limits." In Louisiana, where a similar jurisprudence prevails, that of French law, this point has been fully discussed and settled in a great number of decisions. 12 Martin, *L. R.*, p. 428, *Irving* vs. *McCrummer*, held, " to cons-" titute a sale *per aversionem* there must be certain limits or " boundaries given or a distinct or separate object described, " as a field enclosed, an island, &c., because it is presumed " that the parties have their attention fixed rather on the " boundaries than on the enunciation of quantity. 4 Lou. R., " 536 ; 5 Lou., 241. Held, that the sale of the tract by limits " for a fixed price is a sale *per aversionem*, these circums-" tances must control the problematical description as to " quantity. This title was clearly translative of property to " the whole extent of the limits given in the act of sale, and " the evidence shews that the vendee took possession under " the sale, and there is not any evidence that the possession " assumed was contrary to the will of the vendee; it must " therefore be considered as a civil possession *pro emptore* ex-" tending over the whole tract of land as sold by limits ;" and so in *Gromley* et al. vs. *Oakey* et al., 7 Lou. Rep., p. 457: " This court has frequently had occasion to consider the prin-" ciples which govern sales of that character, *per aversionem*, " and it has been settled in several cases, that where a sale " is made with reference to known and definite boundaries, " they will control the enumeration of quantity." And, in a very esteemed modern French author, Curasson, *Actions possessoires*, p. 462, it is laid down, " si les titres marquent des " limites précises, on doit avoir égard à ces limites plutôt qu'à " la contenance, qui dans les actes est presque toujours indi-" quée d'une manière incertaine et par aperçu. Le principe " que les confins doivent être préférés à l'énonciation est d'une " jurisprudence constante." And, finally, Troplong. *Vente*, 1 vol. p. 439 : " La condition de mesurage n'a pas pour objet de " faire savoir ce qui a été vendu, car la chose forme *un corps* " *certain* contenu dans des limites déterminées et dont toutes " les parties sans exception sont comprises dans le marché, " sans le mesurage, on sait àn'en pas douter en quoi consiste " l'objet vendu." The question of excess or its value as equivalent could never be entertained in such a case as this, because this is not a *vente à la mesure*, but of a *corps certain pour prix fixe ;* and the principle of law is so positive that it cannot be departed from, it is drawn from the Roman law, which held that all lands conveyed by artificial lines of mensuration are, as the term imports, *agri limitati*, whether the contents in superficies be set forth or not. The Appellant's recourse in argument to the law of modern France, under the

code, with reference to the question of excess, cannot avail, because the code, as Duvergier, *Observes*, 1 vol. p. 281 (note), has for France abrogated the old common law, which is still the common law of this province, and as he says: "Il a pros-" crit les distinctions indiquées dans les anciens auteurs, Voet, " Lapeyrère, Despeisses, etc., etc.," but even he admits that in case of a sale, as above, *de cet immeuble indiqué des quatre côtés, dont le prix est fixé par le contrat non à tant la mesure, mais avec indication de contenance*," in that case, the contenance is subordinated to the limits. Under all these circumstances of law and fact, the relative absolutely fixed positions of Captain John Ruiter, the vendor, and of George and David Krans, the vendees, under the terms of the deed of 1813, in respect of the lot No. 3, were as follows: They owned and possessed the eastern part which extended from the external west line of the lot No. 3, across the lot between the west and south line boundaries up to the east boundary, formed by a line running from the said hemlock tree, on the line of the south boundary, and across the lot at the foot or along the ledge of rocks running across the lot to the north boundary line. The remainder of the lot, forming the western part, from the said lines running at the foot of the ledge of rocks and extending to the east boundary of the lot adjoining No. 4, was the property of Captain John Ruiter. They, George and David, had absolute property and full possession of their lot as above limited, there being no evidence to shew that their possession was contrary to the will of the vendor, and moreover they held by an indefeasible title from him, and were not subjected to diminution in area. This was the relative position of parties previous and up to the sheriff's adjudication in 1845. Was the position changed by the decret? The Appellant has produced no deed or title anterior to that from the sheriff to Houghton, of a lot of land of the declared contents of ninety acres, being part of No. 3, on a plan of division, &c., made by Lay in 1809, &c., aud bounded to the west by the remaining part of the lot No. 3, owned by Miles Krans, &c. The evidence that parties were in possession after the death of Captain John Ruiter, will not establish title in them, however stoutly it may be asserted; such evidence is not proof of property without production of title known to the law. The Respondent brings into court a continuity of title by himself and his predecessors for fifty years with possession, a period of time and possession which would secure the property to him even without title; whilst the Appellant produces 1st sheriff's deed of sale of 1845, thirty-two years after the date of the deed of 1813; and 2nd, Houghton's sale to him forty-two years after the date of the deed of 1813. But the sheriff's adjudication

could not give more property than was left to Ruiter after his sale of 1813; it did not assume to sell any property belonging to Miles Krans, although the adjudication did indicate certain *contenance*, ninety acres, in the adjudged lot. The mere indication of contents in a sheriff's or other deed cannot deprive a neighboring proprietor, indicated as the neighboring land owner, of a part of his property, to make up for the deficiency in the indicated contents adjudged by the sheriff. Such a pretension would overturn every title to property and breed interminable confusion; and no law can evict a proprietor from his property to complete the deficient contents of an adjudged lot of land merely because it adjoins his property. The *adjudicataire* must consider his interests at the *decret*, and protect himself if he should not obtain his quantity, by claiming a diminution in the price of his adjudication, under the claim *quanti minoris*. His remaining passive with less than his quantity of land cannot avail him to take the deficiency from his neighbor. He cannot claim through Captain John Ruiter, or any alleged owner after him until the date of the sheriff's deed, because he must have produced title to do so, but he rests upon the sheriff's deed, which cannot support his pretension against Respondent: he must therefore be satisfied with the line as drawn by the surveyor according to the title of 1813 and as adjudged upon by the Superior Court, by its judgment in this case, which is confirmed.

MEREDITH, J.: As Mr. Justice Badgley has explained fully the principles of law applicable to this case, I shall confine myself to a statement of my views respecting the more important facts connected with the present controversy. The deed of the third of March. 1813, from John Ruiter, to the *auteurs* of the Respondent, was a sale of all the land to be found within certain specified limits; and the question which we have to determine is, as to the site of the easterly boundary line of the lot of land so sold. The rights of Appellants, whatever they may be, cannot interfere with those of Respondent, because they both claim from the same *auteur*, John Ruiter; and we have before us the sale made by him in favor of the *auteurs* of Respondent, but not the conveyance under which the remainder of the lot was disposed of. We, therefore, must regard the title of Respondent as being earlier than that of Appellant; and, consequently, hold that the title from John Ruiter in favor of the *auteurs* of Respondent must be satisfied in preference to any conveyance that may have been made subsequently by John Ruiter or his representatives. Reverting then to the deed of sale in favor of the *auteurs* of Respondent we find the following

description of the lot thereby sold: "About fifty acres of land "situate in the Seigniory of St. Armand aforesaid, known "and distinguished by lot number three, the said fifty acres "or thereabouts to extend from the westerly boundary line "of said lot and on the whole width thereof, and easterly to "the foot of a ledge of rocks which runs across the said lot "at a certain distance easterly of a certain brook which runs "across said lot the southeasterly boundary of which said "part is a hemlock tree which stands on the southerly "boundary line thereof, and is marked G. and D. K., 1813, "with all the buildings and improvements thereon, and other "the appurtenances and dependencies whatsoever thereunto "belonging or in any wise appertaining." The parties are agreed as to the situation of the hemlock tree, forming the south-easterly line of Respondent's lot, the controversy between them being limited as to the course of the line running to the tree. The pretensions of Appellant are that the line in question ought to run paralled to the ends of the lot, and to form right angles with the north and south lines. Whereas Respondent contends that the said line should run diagonally across the lot, from the southern boundary north-easterly across the lot following *the ledge of rocks* mentioned in the description of the lot sold by John Ruiter to the *auteur* of Respondent. That description certainly is not clearly worded, but still it seems to me impossible to suppose, that if, as Appellant alleges, the parties intended the line in question should run parallel with the ends of the lot, and at right angles with the north and south lines, that the description could have been worded as it is. Not only is there not one word tending, however remotely, to indicate such an intention, but there are words clearly indicating, I think, a contrary intention. To what purpose did the description refer "*to the ledge of rocks which runs across the said lot*" and specify the situation of that ledge as being "*at a certain distance easterly of a certain brook which runs across the said lot*," if the division was to be a straight line uninfluenced by the course of the *ledge of rocks* so carefully described. The ledge of rocks which runs *across* the said lot cannot, I think, have been referred to for the purpose of determining the south-easterly boundary of the lot sold; for that was placed beyond the possibility of doubt by the hemlock tree marked "G. and D. K." (the names of the purchasers) "1813;" and if the ledge of rocks was not referred to for that purpose, it must, I think, have been referred to as indicating the course of the line. As I read the description, in the Deed of the 3rd of March, 1813, it gave the *auteurs* of Respondent that part of the said lot lying between the westerly boundary line of the

said lot and "the foot of the ledge of rocks which runs across "the said lot at a certain distance easterly of a certain brook, "which also runs across the said lot," the south-easterly boundary of the said lot being the said hemlock tree marked as already mentioned. The Appellant, however, contends that the deed has its full effect by giving Respondent's lot "*a* "*width to the north side to the foot of the ledge of rocks there.*" But the "ledge of rocks" *on the north side* at the foot of which Appellant contends Respondent's lot should terminate must be considerably to the *west* of the brook spoken of in the description; whereas the ledge of rocks given in the deed as a description is to the *east* of that brook. The Appellant also contends "that the deed has its full effect by giving "Defendant's lot a width, on the south side, *to the ledge of* "*rocks;*" as a boundary, not across the whole of the lot, but on the south line only, but, as I have already said, it was needless to refer to the ledge of rocks as a boundary on the *south* line, because upon that line the parties had made the hemlock tree, marked as already mentioned, the boundary. Moreover Appellant, in order to make out a description in accordance with his views, is obliged to refer to *two different ledges of rock*; whereas the deed refers to but *one ledge* of rocks, and speaks of that ledge as running across the lot. It is quite true that the line in accordance with the pretensions of Respondents is far from being a straight line; but the parties to the deed of the 3rd March, 1813, were not under any obligation to divide their properties by a straight line, and it does not seem that it was their intention to do so. Such being my views as to the facts of the case; and agreeing as I do with M. Justice BADGLEY, as to the rules of our law on this subject, I am of opinion that the judgment of the Superior Court, ordering the line in question to be drawn "along the base of the said ledge" ought to be confirmed.

Judgment confirmed.

The present appeal was from this judgment of confirmation, and was argued by M. MANISTY, Q. C, and M. WILLS for the Appellant; and by M. J. WESTLAKE and M. A. AITHEN, for the Respondent. Appellant's contention was, that the case ought to have been decided upon the deeds alone, or upon the deeds and parol evidence of uninterrupted user; and insisted that the judgment was erroneous, in giving him a little more than sixty acres, when he had purchased ninety acres. For Respondent, it was submitted, first, that Ruiter's sale to the Kranses, in 1813, was a *corps certain* defined by metes and bounds, and not liable to be affected by an erroneous indication of quantity, and that the Court had properly determined the boundary; secondly, that Respondent and his predeces-

sors in title had held the quantity of acres the Court awarded, uninterruptedly, for more than thirty years, in accordance with such boundary and were thus entitled by prescription.

Sir RICHARD T. KINDERSLEY gave the judgment: This is an appeal from a judgment of the Court of Queen's Bench, of Lower Canada, dated the 1st of March, 1864, affirming a judgment of the Superior Court of that province, dated the 31st of October, 1862. The action in which these judgments were given was an action *en bornage* by Appellant, to have the boundaries, between two contiguous properties of the Appellant and Respondent, ascertained and determined. The following are the circumstances out of which the action arose: One John Ruiter, who died in or before the year 1809, was the owner of a landed estate in the seigniory of St-Armand, in Lower Canada. After his death, his estate was, in 1809, divided among his heirs, according to a plan of partition shewn on a map, made and prepared by one Amos Lay, a surveyor. One of the heirs was captain John Ruiter, and by the partition there was allotted to him (besides another piece of land containing about sixty acres, called lot 4 on the map, not in question in this suit) a piece of land distinguished on that map as lot 3, and described as containing 140 acres. This piece of land, which it will be convenient always to call lot 3 (that being its designation not only on the partition map, but also in the subsequent deeds of both the Appellant and the Respondent) is in form (speaking with mathematical accuracy) a trapezium, but it is so nearly a rectangular parallelogram, that, for all practical purposes, it may be so considered, and, indeed, it is so represented in some of the maps given in evidence. It is bounded on the south by the boundary line between Canada and Vermont, which is a straight line running along the 45th parallel of latitude, and, therefore, of course, running due east and west; its western boundary is a straight line drawn perpendicularly to the southern boundary; its eastern boundary is a straight line drawn very nearly, though not quite, perpendicular to the southern boundary line; and its northern boundary is a straight line drawn from the northern end of the western boundary line, and running towards the east, parallel, or very nearly parallel, with the southern boundary. Its length from west to east is greater than its width from south to north. It consisted, at the period referred to, of wild forest and woodland, but it appears that in comparatively recent times some patches of it had been cleared for pasture. It is necessary to observe that at a point on the southern boundary line of this lot 3, at a distance from the south-western corner of one-third of the whole length of the southern boundary line, a brook crosses

the southern boundary, flowing into and diagonally across lot 3, the direction of its course being about N. N. E.; and a little to the eastward of this brook, a ledge of rock runs also diagonally across the whole lot 3, from the southern to the northern boundary, in a direction nearly the same as that of the brook. It is further to be observed, that, by recent survey and measurement, made under an order of the court below, this lot 3 is found to contain 144 acres and 2 roods. In 1813, captain John Ruiter, being the owner of this lot 3, sold a part of it, at the western end thereof, to two brothers, George and David Krans; and by a deed, dated the 3rd of March, 1813, he conveyed to them by the following description: "About fifty acres of land, part and parcel of that tract of land situate, lying and being in the Seigniory of St. Armand, known and distinguished by lot n° 3; the said fifty acres, or thereabout, to extend from the westerly boundary line of the said lot, and on the whole width thereof, and easterly to the foot of a ledge of rocks which runs across the said lot, at a certain distance easterly of a certain brook which also runs across said lot, the south-easterly boundary of which said part of said lot is a hemlock tree, which stands on the southerly boundary line thereof and is marked G. and D. K. 1813." It is upon the construction which ought to be put upon that description that the controversy between the parties mainly turns. The portion of lot 3 thus conveyed to George and David Krans, afterwards became the property of Miles Krans. By a deed dated the 23rd of February, 1846, Miles Krans conveyed it to James Slade Allan; and by a deed, dated the 17th of January, 1848, Allan conveyed it to the Respondent. In both these deeds, the property conveyed is described in the same terms as those before mentioned to have been contained in the deed of the 3rd March, 1813. The remaining portion of lot 3, which was not comprised in the conveyance to the Kranses, afterwards passed from Captain John Ruiter, through successive holders, until it became vested in one George Chipman; and by a deed dated the 15th of August 1845, the Sheriff of the District of Montreal, under a writ of execution sued out by one Abel Houghton, against the lands and tenements of George Chipman, sold and conveyed to Abel Houghton by the following description: "A lot of land, situate in the Seigniory of St. Armand in the district of Montreal, being part of lot n° 3, on a plan of division of the land of the late John Ruiter, among the heirs of his estate, the said plan made by Amos Lay, surveyor, and dated the 6th day of December, 1809, containing ninety acres in superficies, more or less; bounded to the south by the Province line; to the west, by the remaining part of the said lot n° 3, owned by Miles Krans; to the north, by Miles Krans and

James Allan; and to the east by lot n° 4, on the said plan." It appears that, in that transaction, Abel Houghton who was the cashier of the St. Albans Bank, was acting on behalf of, and as trustee for that Bank; and by a deed, dated the 23rd of October, 1855, Abel Houghton, on his own behalf, and on behalf of the St. Albans Bank, and by virtue of a power of attorney from the bank, sold and conveyed to the Appellant the land comprised in the Sheriffs deed by the same description. The Appellant's case is, that the property comprised in those two last mentioned deeds was the residue of lot 3, not comprised in the conveyance of the 3rd of March, 1813, to the two Kranses. He has not however, proved the conveyances or other instruments by which that residue passed from Captain John Ruiter, and became vested in George Chipman; and upon that ground an objection has been raised by the learned counsel for the Respondent that it is not shown that George Chipman ever was the owner of the eastern portion pootion of lot 3, and therefore, that the Appellant not having proved his title to that portion, could not maintain his action. That objection, however, their lordship have no hesitation in disallowing. It is not suggested that any person has, or claims to have any right or title to any portion of lot 3, other than the Appellant and the Respondent. Moreover, the Respondent with the view of proving that the owner, for the time being, of the western portion of lot 3 had exercised acts of ownership on the portion of land which is in controversy, with the knowledge of, and without objection by the owner, for the time being of the eastern portion of the said lot, called as witnesses in the court below, Miles Krans and James Slade Allan, who had been successively the owners of the western portion; and their evidence shews that Chipman was at one time the owner of the eastern portion of lot 3. Miles Krans, after stating that he cut wood on the lot says: "During the "time I so cut wood on the said lot of land, to the east of it." ("to the east of it" means the eastern part of it), "now "owned by the Plaintiff" (the Appellant), "was possessed "successively by John Ruiter, John Rhodes, Anthony Rhodes; "after which, I think, it went into the hands of George Chip-"man." Allan says: "Old Mr. Rhodes, and Mr. Chipman, and "the Bank of St. Albans were, one after another, in possession "of the east part of the said lot, to the east of the foot of the "ledge of rocks. Old Mr. Rhodes was in possession of it when "witness first went there in 1836; afterwards, Chipman, and, "subsequently, the Bank of St. Albans and Mr. Chipman, as I "understood." Another witness called by the Respondent, namely, Augustin Lavoie, deposes that the Respondent's cows were impounded by Chipman, for having trespassed on his part

of the said lot ("pour avoir traversé sur sa part du dit lot.") It cannot be doubted that Chipman was the owner of the eastern portion of lot 3; and it is to be observed that the description in the conveyance made by the Sherift to Abel Houghton, under the writ of execution against Chipman, is an apt and appropriate description of so much of lot 3 as was not comprised in the conveyance of the 3rd of March, 1813 by Captain John Ruiter to Ceorge and David Krans. And it may be added that the Respondent, by his plea, so far from disputing the Appellant's title to the eastern portion of lot 3, by strong implication and almost in terms, admits it; and the plea ends with a prayer that it may be adjudged and ordered that the measures and boundaries of the said lands and properties of the Appellant and Respondent may be had and made by a sworn land surveyor, to be agreed upon by the parties, or appointed by the Court. Assuming, then, that the Appellant is the owner of the eastern, and the Respondent of the western portion of this lot 3, the question is, what is the right boundary between those two portions? That question is, in truth, the same as this, what according to the true construction of the words of description in the conveyance of the 3rd of March, 1813, from Captain John Ruiter to George and David Krans, having regard to the local features therein referred to, was the eastern boundary of the property thereby conveyed? All depends upon the construction of that deed, and nothing which has since occured can affect that construction. The question must now be tried between the Appellant and Respondent, in precisely the same manner as it would have been tried if the dispute had arisen between captain John Ruiter, and George and David Krans immediately after the execution of the deed of the 3rd of March, 1813. The Appellant insists that, according to the true construction of that deed, the parties thereto intended that the eastern boundary of the portion thereby conveyed should be a straight line drawn from the hemlock tree, situated on the southern boundary line, due north, i. e. parallel to the western boundary line, till it meets the northern boundary line. The Respondent, on the other hand, insists that the parties intended that the eastern boundary of the portion conveyed should be the foot of the ledge of rocks along its whole course. Now, whichever of these two views is the right one, it appears from the evidence, that if the Appellant's view be adopted, then the effect will be that the portion conveyed by that deed would contain a little more than fifty acres, agreeing, therefore, with the quantity mentioned in the deed, which is "about fifty acres." Whereas if the Respondent's view be adopted, and the ledge of rocks is held to be the eastern boundary of the portion

conveyed by the deed, then the effect will be that portion would contain eighty-two acres, instead of "about fifty." This consequence of the success of the Respondent's contention is, it must be confessed, somewhat startling. Let us now see how the case was dealt with by the learned judges of the Superior Court, and afterwards by those of the Court of Queen's Bench, on appeal. In the Superior Court the case was heard before Mr Justice Smith, who decided in favour of the Respondent (the then Defendant); and made an order, dated the 27th of May, 1862, directing that a line should be run by a sworn surveyor, to be agreed upon by the parties, or (if they could not agree) to be appointed by the court, along the base of the ledge of rocks as the boundary between the Appellant and Respondent respectively. We have not the advantage of knowing the reasons for which Mr Justice Smith came to this conclusion. The parties not agreeing on a surveyor, one Amos Vaughan, a sworn surveyor, was appointed by the court; and in obedience to the order of Mr Justice Smith, he drew a boundary line along the base of the ledge of rocks, from the southern to the northern boundary of the lot; and he duly made his report, stating in detail what he had done, which report was filed on the 17th of October, 1862. On the 31st of October, 1862, the case came again before the Superior Court, on the report of the surveyor, and of two motions by the Appellant, that the order of Mr Justice Smith might be revised, and that the surveyor's report might be rejected, and on a motion by the Respondent that the surveyor's report might be approved and homologated; whereupon Mr. assistant justice Monk, before whom the matter came, made an order rejecting the Appellant's motions and granting that of the Respondent, homologating the surveyor's report, and establishing the boundary as set out in that report. In the Appellant's case on the appeal to the Court of Queen's Bench, some remarks of Mr. assistant justice Monk on that occasion are set out, from which it would appear that he considered the order of Mr. justice Smith as final, and not as interlocutory, for which reason it was not in his power to revise it, but that he used expressions which might lead to the inference that he was not satisfied with the decision of Mr. Justice Smith. However this may be, it seems certain that he (Mr. assistant justice Monk) expressed no opinion in favour of the Respondent's case. The Appellant having appealed to the Court of Queen's Bench, the case came on for hearing before that court, on the first March, 1864, in the presence of Mr. assistant judge Badgley, Mr. Justice Meredith and Mr. Justice Mondelet, and the decision of the Superior Court was affirmed. We have the reasons or judgments of the three learned judges. Mr. Justice Badgley,

in his judment, seems to assume that the description in the deed of the 3rd of March, 1813, specified all the boundaries of the portion of lot 3 which was thereby conveyed, and in particular, that it specified the ledge of rocks as the eastern boundary; and then he cites several authorities to show that if, in a deed of conveyance, the description of the piece of land conveyed states its boundaries on all sides, and states also its contents, but states them incorrectly, then that part of the description which specifies the boundaries must prevail, and the specification of the quantity must be disregarded. If the assumption of the learned judge be correct, there would seem to be no reason to challenge the conclusion. But the assumption that the deed of the 3rd of March, 1813, specifies the boundaries of the land conveyed on all its sides, is simply begging the whole question. The very question between the parties is whether, upon a true construction of the language of the deed of the 3rd of March, 1813, it did make the ledge of rocks the eastern boundary of the piece of land thereby conveyed. And to that question the judgment of Mr. Justice Badgley is not addressed. Indeed, it may be doubted whether the learned judge had not before him by some mistake, instead of a true copy of the description in the deed, some paper which (though purporting to be a copy) was altogether incorrect. For towards the earlier part of his judgment, after a statement of the facts, and observations on the circumstances that the Appellant produced no title deed earlier than the sheriff's conveyance to Abel Houghton in 1845, we find this passage: "The piece of land, the Krans' purchase, and the Respondent's property, is described as inclosed within fixed boundaries, plainly described on the four sides, with a south-east point of departure for (misprinted from) the eastern boundary, as follows; " (Now, what follows is in inverted commas, as if it was a quotation from the deed.) "Running north-west (clearly a misprint for north-east) at the foot or along the foot of a ledge of rocks, which runs across the lot at a distance east of a certain brook, which runs across the said lot." (After that quotation he proceeds): "The ledge of rocks and brook being natural boundaries, can admit of no dispute, and are shewn on the map or plan of division mentioned in the sheriff's deed." If the learned judge was accidentally led to suppose that the passage which he puts in inverted commas was a true copy of the words of the deed, it is no wonder that he made the assumption that in the deed the piece of land was (as he says) "described as inclosed within fixed boundaries plainly described on the four sides." The judgment of Mr. Justice Meredith is not open to the same remark. He discusses the question of the construction of the description in the deed, and

arrives at the conclusion that it was intended that the ledge of rocks should be the eastern boundary. The substance of his able reasoning on the point is contained in the following passage in his judgment: "That description certainly is not clearly worded; but still it seems to me impossible to suppose that if, as the Appellant alleges, the parties intended the line in question should run parallel with the ends of the lot, and at right angles with the north and south lines, the description could have been worded as it is. Not only is there not one word tending, however remotely, to indicate such an intention; but there are words clearly indicating, I think, a contrary intention. To what purpose did the description refer to "the ledge of rocks which runs across the said lot," and specify the situation of that ledge as being "at a certain distance easterly of a certain brook which runs across the said lot," if the division was to be a straight line uninfluenced by the course of the ledge of rocks so carefully described? The ledge of rocks which runs across the said lot cannot, I think, have been referred to for the purpose of determining the south-easterly boundary of the lot sold, for that was placed beyond the possibility of doubt by the hemlock tree marked "G. and D. K." (the names of the purchasers) "1813;" and if the ledge of rocks were not referred to for that purpose, it must, I think, have been referred to as indicating the course of the line." These observations of the learned Judge seem to present the arguments in favour of the Respondent's view as clearly and as strongly as it is possible to put them. Those arguments will be noticed presently. Mr. Justice MONDELET differed from his two colleagues, and thought the decision of the Superior Court ought to be reversed. The reason he assigns is, that the effect of that decision was to give the purchaser eighty-two acres instead of the fifty, or thereabouts, intended for him by the deed. There being thus two members of the court for affirmance, and only one for reversal, the decision of the Superior Court was of course affirmed. And from that decision the present appeal is brought. The question what construction ought to be put upon the language of the description in the deed of the 3rd of March, 1813, in order to determine the eastern boundary of the piece of land thereby conveyed, is certainly one of considerable difficulty, and it is not surprising that there should have been a difference of opinion among the Judges of the Courts below. But, after full consideration, their Lordships are unable to concur in the conclusion arrived at by the majority of those learned Judges. The language of the deed is extremely indefinite and ambiguous. It is impossible to say that it is quite incapable of the construction contended for by the Respondent; but, on the other hand, we are

of opinion that it is at least equally capable of the construction contended for by the Appellant, and, upon the whole, we think that the latter construction is the one which best satisfies all the language of the deed. By the terms of the deed, the fifty acres of land, or thereabouts, intended to be conveyed, are to extend from the westerly boundary of lot 3 (which, it is to be recollected, is a straight line at right angles, or as nearly as possible at right angles, to both the southern and the northern boundary of the lot) and on the whole width thereof (that is, on the whole width of the lot,) and easterley to the foot of a ledge of rocks, &c.; that is, the portion of land intended to be conveyed is to extend from the western boundary line towards to east,—it is to extend on the whole width of the lot, which seems to imply that its width is to be the width of the whole lot,—and it is to extend eastward till you come to the foot of the ledge of rocks, and there you are to stop. Now, it is obvious that, if after first reaching the foot of the ledge of rocks as you proceed towards the east, the portion to be conveyed is carried on still further to the east, so as to make the ledge of rocks its eastern boundary, all that additional part which would be thus included would not be of the width of the whole lot; for in as much as the ledge of rocks does not run direct from south to north, but diagonally towards the north-east,—the width of that latter part of the portion, instead of continuing to be of the width of the whole lot, would be gradually diminishing in width untill it terminated in a point at the north-east. It would be too much to say that the language of the deed must necessarily receive this construction, and that it is incapable of any other; but it is not too much to say that it is at least as capable of this construction as of the construction contended for by the Respondent. With respect to the argument, that if the parties had intended the eastern boundary to be that which is insisted upon by the Appellant, the deed would not have been worded as it is, but that intention would have been expressed in clear and unambiguous terms,—that argument seems to bear not less strongly against the Respondent's view; for it may be asked, with equal force, if the parties intended the ledge of rocks to be the eastern boundary, why did they not express that intention in clear and unambiguous terms. And with respect to the argument, that the careful description of the ledge of rocks as running across the lot could only have been introduced for the purpose of indicating the whole course of the ledge of rocks as the line of the eastern boundary,—the answer is, that there was this sufficient reason for describing the ledge of rocks as running across the lot, namely, that (as appears from the map made by *Vaughan*, the surveyor ap-

pointed by the Court) there are other ledges of rocks in different parts of the lot which do not run across the lot, and therefore the ledge of rocks in question was described as running across the lot, in order that there might be no doubt which ledge of rocks was intended. With respect to the argument founded on the mention of the hemlock tree as the south-eastern boundary of the portion intended to be conveyed, it appears to their Lordships that this mention of the hemlock tree as the southern-eastern boundary, so far from supporting the Respondent's view, affords a strong argument the other way. The position of this tree, stump of which still remains, appears from the evidence to be near to, but a little to the west of the ledge of rocks where it crosses the southern boundary. Now, if the ledge of rocks through its whole extent across the lot was intended to be the eastern boundary of the portion conveyed, why was the hemlock tree carefully specified as its southern-eastern boundary? Why was not the southern-eastern boundary to be the foot of the ledge of rocks where it crosses the southern boundary of the lot? If the foot of the ledge of rocks was a sufficiently defined eastern boundary throughout all the other part of its course across the lot, why was is not equally so at its extreme southerly end, where it crosses the southerly boundary of the lot? Why was not that (an imperishable object) to be the south-easterly boundary of the portion of land intended to be conveyed? Why was it thought necessary to select, as the object which was to mark the south-easterly boundary (*i. e.*, the south-easterly corner) of the portion of land intended to be conveyed, so perishable a thing as a tree? Why, indeed, was it necessary to specify any south-easterly boundary at all? Why was it necessary to specify a south-easterly boundary more than a north-easterly boundary? It seems impossible to account for this careful specification of a particular defined spot as the south-easterly boundary, and the selection of a particular tree to mark that spot, consistently with the theory of the Respondent, that the parties to the deed intended the ledge of rocks along its whole course to be the eastern boundary of the portion of land thereby conveyed, But if, on the other hand, we adopt the theory of the Appellant, and suppose the intention to have been that the eastern boundary should be a straight line drawn from the southern to the northern boundary line parallel with the western boundary line, then, indeed, we see an obvious reason why it was necessary to specify a precise spot for the south-eastern corner of the portion of land, and why a tree was selected to mark that spot in preference to the foot of the ledge of rocks. For to enable a sur-

veyor or engineer to draw such a line from south to north, it would be necessary to have some precisely defined spot from which the line should start, and that that spot should be marked by a precisely defined object, such as a tree, and not by such an indefinite and uncertain object as the foot of a ledge of rocks were it crosses a boundary line, for a ledge of rocks does not (ordinarily at least) spring suddenly and perpendicularly from the ground, like a brick wall, so as to enable a person to lay his hand on any precise spot and say, that precise spot, and none other, is the foot of that ledge of rocks were it crosses the boundary line. The provision in the deed, that the hemlock tree should be the south-easterly boundary (that is should mark the south-eastern corner) of the portion of land intended to be conveyed, is fully and reasonably accounted for if the Appellant's construction be adopted; but quite unaccountable according to the Respondent's view. But suppose that, notwithstanding these reasons, the question, what the parties to the deed intended to be the eastern boundary, is still to be considered so doubtful, that neither of the two constructions contended for by the parties has any better claim to be adopted than the other, so far as any arguments can be drawn from that part of the language of the deed which we have hiterto dealt with, still, even upon that supposition, there is one consideration which seems decisive in favour of the Appellant's contention. It is a clear principle that if one part of a deed is so ambiguously worded that it is equally capable of two different constructions, one of which is in accordance with, and the other conflicts with, another part of the deed, about the meaning of which there is no doubt, the former construction must be adopted as the right one. And (as an instance of the application of that general principle) if, in a deed conveying land, the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what were intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one of which would make the quantity of the land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail. Applying that principle to the present case, the deed states the intention to be to convey "about fifty acres." The language of the deed with respect to boundaries is (for the present purpose) to be considered as equally susceptible of each of the two constructions contended for. The effect of the one construction is to make the portion conveyed fifty-one acres, that is," about fifty acres," the quantity mentioned in the deed; whereas the effect of the other construction is to make it no

less than eighty-two acres instead of " about fifty acres." According to the principle before referred to, the former construction must prevail. Indeed it is impossible to read this deed, bearing in mind the nature and character and condition of lot 3 at the time, without feeling satisfied that the dominant idea and intention of the parties was that out of this rectangular block of wild uncultivated woodland, which was known to contain about 140 acres, captain John Ruiter should sell and convey to the two Krauses about fifty acres at the western end thereof, in consideration of 225 dollars. The question of boundaries was, to their mind, altogether subordinate to that of the quantity. It is not like the case of a conveyance of a certain ascertained piece of land described precisely and accurately by its boundaries on all sides, adding a statement that it contains so many acres or thereabouts, in which case, if it turns out that the quantity is incorrectly stated, it shall not affect the transaction. It is the case of a conveyance of a certain number of acres, or thereabouts, to be taken out of a larger block of land, and never yet measured off or ascertained followed by directions, expressed in ambiguous language, as to the mode in which it is to be measured off. And, therefore, none of the autorities, or of the reasons which apply to the cases of clearly described boundaries, accompanied by an erroneous statement of the quantity, apply to the present case. Their lordships are of opinion that the construction contended for by the Appellant is the true construction, and ought to be adopted. The Respondent went into a good deal of evidence in the court below, with the view of proving that the possession and enjoyment had always been in accordance with the construction of the deed which he insists upon ; but, upon examination, this evidence, so far from establishing a uniform, continuous, uninterrupted possession and enjoyment from the date of the deed, merely goes to show that during the latter portion of the period which has elapsed since that date, some scattered isolated acts, few and far between, and not of any important character, nor satisfactorily proved to have been known to the owners of the eastern portion, have been occasionally done by some of the owners of the western portion of the lot, upon that part which lies between the two boundaries asserted respectively by the Appellant and the Respondent, such as cutting some wood, or tapping maple tree for sugar, acts which, in the opinion of their lordships, can have no effect in determining the rights of the parties under the deed of the 3rd of March, 1813. The same evidence is relied upon by the Respondent to support an objection which he raises to the action, that the Appellant is barred by the rule of prescription. By the law of Lower Canada, the time of prescription is thirty years.

Now, so far from proving (to use the language of his plea) " public, open, peaceable, uninterrupted possession and ownership for a period exceeding thirty years" of the part of Lot 3 which is in controversy, no one of the occasional acts of ownership deposed to by the witnesses is proved to have taken place at a time nearly so far back as thirty years before the commencement of the action. The plea of prescription entirely fails. Upon the whole, their Lordships are of opinion, that the proper boundary between the two portions of Lot 3, belonging to the Appellant and the Respondent respectively, is a straight line to be drawn from the hemlock tree before mentioned, on the southern boundary line of Lot 3, across the Lot, parallel to the western boundary line, up to the northern boundary line. They will, therefore, humbly advise her Majesty to reverse the decision of the Court of Queen's Bench, and to remit the cause to the Superior Court of *Lower Canada*, with instructions to that Court to make such orders, and take such steps, as shall be necessary and proper to make and establish the boundary between the two portions of Lot 3, belonging to the Appellant and Respondent respectively, by a line drawn from the hemlock tree in the manner before mentioned. (8 *J.*, p. 324 ; 17 *D. T. B. C.*, p. 146 ; 11 J., p. 129 and 4 Moore's P. C. Rep. N. S., p. 349.)

CAPIAS.

SUPERIOR COURT, Quebec, 5th March, 1862.

Before STUART, Justice.

PELLETIER et al., *vs.* FREER.

Jugé : Que, si un capias peut émaner après jugement, il ne peut être maintenu que sur preuve de l'allégation que le Défendeur est sur le point de laisser la province avec intention de frauder ses créanciers. (1)

The action was founded on a judgment of the Superior Court, condemning Defendant to pay to Plaintiffs a certain sum of money. The declaration set forth that this sum of money had never been paid or satisfied in any way, and that, therefore, the judgment not having been satisfied, and not having been reversed in appeal, was still in full force and effect against Defendant ; that Defendant was immediately about to quit the Province of Canada, with the intention of defrauding his creditors in general, and Plaintiffs in particular, and that, by his departure, Plaintiffs would lose their recourse against him ; that, for these reasons, plaintiffs prayed that a

(1) V. art. 798 et 802 C. P. C.

writ of *capias ad respondendum* should issue to take and imprison Defendant; that he should be condemned to pay to Plaintiffs the sum demanded, and that, in default of such payment his arrest and imprisonment should be declared good and valid. The writ issued on the affidavit of one of Plaintiffs, which affidavit, after stating the Defendant was well and truly indebted, and that Deponent believed he was about to leave the Province with the intention of defrauding Plaintiffs &c.; contained the following allegations: "Et que les raisons "sur lesquelles le déposant base sa croyance susdite sont que "le dit William Mulcaster Freer demeure actuellement dans "la ville de Portland, dans les Etats-Unis de l'Amérique, qu'il "ne se trouve en Canada qu'en passant, et qu'il doit s'en "retourner à Portland immédiatement; qu'il n'a dans le Ca-"nada aucuns biens meubles ou immeubles, à la connaissance "du déposant, au moyen desquels le déposant, et le dit Edouard "Pelletier fils, puissent être payés de leurs créances susdites. "Que le départ susdit privera le déposant, et le dit Edouard "Pelletier fils, de leur recours contre le dit William Mulcas-"ter Freer, et que, sans le bénéfice d'un *capias ad responden-"dum* contre la personne du dit William Mulcaster Freer, le "déposant croit qu'il, et Edouard Pelletier fils, perdront leurs "créances sus lites." The Defendant moved for the quashing and setting aside of the writ of *capias ad respondendum.* "Because the writ was improvidently issued, and because "there were no sufficient grounds in the affidavit to justify "his arrest." By the interlocutory order, made upon this motion, on the 2nd November, 1860, (TASCHEREAU, Justice,) the affidavit upon which the *capias* issued was declared sufficient. The Defendant having made default to plead to the action, Plaintiffs were heard *exparte;* the motives for the dismissal of the action appear from the following observations of:

STUART, Justice: The only evidence is the judgment upon which the action is founded. I entertain grave doubts upon the right of Plaintiffs to summon Defendant to answer a claim founded upon a judgment of this court. What defence can he have? Would he be permitted to traverse that judgment? If such an action can be brought where is this right to end; supposing the present action to be maintained, and Defendant a second time condemned by the same court to pay the same sum of money, could Plaintiffs, next month, upon making oath that Defendant is about to secrete his estate and effects sue him a third time upon the two judgments already obtained, and get a third judgment. One judgment ought to be enough, and if the means of enforcing payment are insufficient, they ought to be made sufficient; but, without going the length of saying that an action founded on a

judgment of this court, cannot be brought, though, I strongly incline to that opinion, it seems to me clear that, if this action can be maintained at all, it must be upon proof of the allegation that Defendant is about to leave the Province with intention to defraud, which allegation manifestly is the foundation of this second action, and failing in this proof it must be dismissed.

JUDGMENT: Action dismissed. (12 *D. T. B. C.*, p. 199.)

CASAULT and LANGLOIS, for Plaintiffs.

VANNOVOUS, for Defendant.

COMPENSATION.

SUPERIOR COURT, Quebec, 5th December 1861.

Before STUART, J.

MOSS et al, Plaintiffs, *vs.* BROWN et al., Defendants, *and* HARDY, Plaintiff *en reprise d'instance.*

Jugé: Que dans une action portée par l'héritier d'un débiteur insolvable décédé pour recouvrement d'une dette contractée avec ses exécuteurs; une dette due par le défunt au Défendeur peut être offerte en compensation. (1)

This was an action brought by Plaintiffs, in their qualities of testamentary executors of Roger Finn, who died at Quebec, on the 9th March, 1859. The Plaintiffs set forth, in their declaration, that, on the 12th of May, 1859, and after the death of Roger Finn, Defendants made and signed certain promissory notes in their favor, in their qualities above mentioned, and that when these notes became due Defendants refused to pay them; they therefore claimed judgment for $3651.58 the amount of the notes. The Defendants pleaded in compensation that the late Roger Finn was indebted to them in the sum of $5173.50 for the various reasons in their plea set forth. The Plaintiffs replied specially that compensation could not be pleaded, because the amount offered in compensation was due Defendants by Finn at the time of his death, when he was insolvent, and because the amount claimed by the action was due Plaintiffs in their above mentioned qualities for certain effects of Finn's estate by Plaintiffs sold and delivered to Defendants; because Finn's estate was then insolvent, and, therefore, Defendants had no right to possess themselves of the assets of the estate to the detriment of the other creditors, and, further, that there was an action pending between the parties to the present suit in which Defendants sued Plaintiffs for the recovery of the amount offered in compensation. In the

(1) V. art. 1187 et 1188 C. C.

month of June, 1860, Defendants moved to stay proceedings; inasmuch as more than a year and a day had elapsed since the decease of the late Finn, and Plaintiffs had in consequence ceased to have the power of exercising the duties of executors, until such time as the *instance* should be taken up by the parties entitled to do so by law. In the month of November, 1860, Joseph Hardy, tutor to the minor children of the late Finn, his universal legatees, petitioned the Court to be allowed to take up the *instance*. On the 5th March, 1861, Plaintiff *en reprise d'instance* admitted that a judgment had been rendered against the executors of Finn's estate in favor of Defendants for the amount mentioned in their perpetual exception, and consented that the judgment should have the same effect as if it had been pleaded in the same manner as the debt was pleaded in their said exception.

ANDREWS, for Plaintiffs: Compensation is a fictitious payment founded entirely on equity, and, whether it shall take place or not is almost entirely a question of equity. If the debtor has paid when he might have compensated, he can recover back the amount as having paid that which he did not owe. In case of distribution rendered necessary from the insolvency of an estate, if a debtor to the insolvent estate was also a creditor of the estate before the insolvency, he may plead compensation, but if he shall have become a creditor since the insolvency, his plea would not be maintained.(1) In cases of insolvency, the creditors of the insolvent estate share the proceeds, and the distribution is made *au marc la livre*. (2) Let us examine in what cases of insolvency compensation can be pleaded to an insolvent debtor's action. Merlin, in his *Questions de Droit*, says the insolvency of a person who was at the same time debtor and creditor, cannot prejudice the right of his creditor to his plea of compensation; but, if a debtor before his creditor's insolvency, become his creditor after, no compensation takes place, the amount which has become due to the insolvent debtor since the insolvency, goes into and forms part of the *mass*, and the amounts, by him due, to his different creditors are paid by him *au marc la livre* according to the value of his estate. (3) And this is equitable and just, because to allow the compensation in such a case, is to permit one creditor not in any way privileged to take the whole, or a part of the insolvent estate to the great loss and prejudice of the others, and because compensation being a fictitious payment, where payment in full cannot

(1) Guyot, Rep. de Juris., vbo. Compensation.

(2) Merlin, Questions de Droit, vbo. Contribution entre Créanciers.

(3) Merlin, Questions de Droit, vbo. Papier Monnaie.

legally be made, compensation in full ought not be allowed. (1) The English law contains the same principle where it refuses to permit a set off when it would alter the course of distribution. (2) The price of goods sold to a creditor is to be distributed in the same manner as if they had been sold to a stranger. (3) A second ground on which Plaintiffs rely for the dismissal of Defendants' plea of compensation is, that Defendants have had a judgment rendered in their favor for the amount pleaded in compensation, and, if their plea be allowed in the present case, Plaintiffs should have pleaded compensation to the action of Defendants, but this plea of compensation was not presented, because it was unjust that the compensation should take place to the prejudice of the other creditors. A plea of compensation is a demand of payment, which cannot be maintained when there is already an action pending, or a judgment rendered for the amount. If a party, who might have pleaded compensation, pays the amount claimed, he can recover the sum back; therefore, if a party entitled to a plea of compensation, suffers a judgment to be rendered against him, he must have a right to obtain judgment for the amount due him.

IRVINE, for Defendants: Admitted the principle contended for by Plaintiffs' Counsel to be correct; namely: that, in case of insolvency, no creditor could obtain an advantage over another, by any act subsequent to the insolvency of the debtor, but denied that this principle of law applied to the present case; it was to be borne in mind that this litigation was between a creditor and the heir of the debtor himself; and the heir could urge no objection in defence, which would not have been good in the mouth of the original party to the transaction. In the present instance, Plaintiffs admitted that they where indebted to Defendants in the amount pleaded in compensation, but resisted that plea, on the ground that if successful its effect would be prejudicial to their other creditors; now no man is permitted to plead in the interest of another, and, although the objections now urged by Plaintiffs might come with some reason in another shape from their other creditors, they have no avail when urged by themselves. The effect of maintaining the pretentions of Plaintiffs would be to transfer a sum of money from the hands of a creditor into those of the insolvent debtor, a proceeding evidently not to the interest of the creditors. The circumstance of Defendant's having obtained judgment for the amount of their claim cannot have

(1) Nouveau Denisart, vbo. Compensation.

(2) 26 Law and Equity Reports, p. 565, Watts vs. Rees.

(3) 23 Law and Equity Reports, p. 45, Lambarde vs. Older.

any effect upon the present case, if the compensation be allowed Defendant's judgment will be discharged to the extent of Plaintiff's claim in this case.

JUDGMENT: Considering that this court ordered a rehearing of this cause, which was had upon the propriety of the heirs of the late Roger Finn being admitted to take up the *instance* in an action brought by his executors to enforce a contract made with them, and that, as the parties uphold the *reprise d'instance*, it becomes the duty of the court to decide the issue raised by the parties: Considering that Roger Finn, at the time of his decease, was indebted to Defendants in the sum $4061.30, and that his heirs, as such, now owe the same to Defendants, and that, by law, they Defendants have a right to set up the debt in compensation to any debt the heirs of Roger Finn, as such, may claim from them Defendants; and, considering that the debt due by the heirs of the late Roger Finn to Defendants exceeds in amount the debt due by Defendants to the said heirs, and claimed by this action, to wit: the amounts of the promissory notes declared upon made at Quebec, by the Defendants, on the 12th May, 1849, &c. The court maintains Defendant's plea of compensation, by them pleaded, doth declare the debt claimed by Plaintiffs against Defendants compensated and extinguished, and doth dismiss Plaintiff's action, each party paying his own costs. (12 D. T. B. C., p. 202.)

ANDREWS and ANDREWS, for Plaintiffs and *reprenant l'instance.*

HOLT and IRVINE, for Defendants.

COMPETENCE.—GAGES DE MATELOTS ETRANGERS.

CIRCUIT COURT, Quebec, 21st December, 1861.

Before TASCHEREAU, Justice.

CARROLL *vs.* BALLARD.

Jugé: Que la Cour a juridiction sur demandes pour gages par des matelots étrangers contre le capitaine de leur vaisseau, dans ce port, et s'enquerra du *lex loci* pour constater s'il existe un contrat légal qui empêche le matelot de contraindre le paiement de ce qui lui est dû.

This was an action by an American seaman for $30.31, wages alleged to have been earned on board an American ship called the *Argo*, of which Defendant was master, on a voyage from New-York to Bremen, and thence to Quebec. The ship was lying in the port of Quebec when the suits brought by Plaintiff and three other sailors were instituted, and notice of the intended proceedings was given to the Ame-

rican Consul. A plea to the jurisdiction of the Court was overruled, and the defence then rested on the contract signed by Plaintiff and other mariners belonging to the ship, at New-York, on the 29th May, 1861, before the commencement of the voyage, whereby it was agreed that they should serve on board "from the port of New-York to Bremen, with the privilege of one or more ports in Europe, thence as the master may direct for the term of twelve calendar months." The Defendant pleaded that this contract still subsisted, and further contended that the express stipulation in the articles that "no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of said vessel, at the said vessel's final port of discharge, and her cargo delivered," was a bar to the present action.

HEARN, for Plaintiff: The Act of Congress printed on the back of the contract requires "the voyage or voyages, term or terms of time" for which every seaman shall be shipped to be declared in the shipping articles. To comply with this enactment it is necessary that, in the description of the voyage, the terminus *a quo* and the terminus *ad quem* should be clearly specified. Here the voyage has no definite end, the port to which the vessel is to return not being designated. One of the requisites of good and valid shipping articles is therefore wanting, and either party, the master or the seaman, may put an end to the contract. The clause that the seamen shall not demand their wages until the vessel's arrival at the final port of discharge, cannot be enforced any more than the remainder of the contract, for want of the designation of that port, as required by the statute. (1)

DUNBAR, for Defendant: The courts are always reluctant to interfere in disputes between the master and seamen of a foreign vessel, and the exercise of the jurisdiction even of the admiralty, in suits for wages promoted by foreign seamen against foreign vessels, as questions of general maritime law, is discretionary in that court, and to be permitted or withheld according to the circumstances of the case. The twelfth section of chapter 56 of the consolidated statutes for Lower Canada, shews the unwillingness of our own legislature to sanction interference with foreign contracts of this nature. While providing for the punishment of seamen belonging to foreign merchant vessel, on conviction of desertion, before a justice of the peace, this statute declares that: "The oath of the master "of any such foreign merchant vessels, or of any officer or

(1) Flanders, *On shipping*, p. 358, sec. 443, p. 362, sec. 446, p. 363; The Sarah Jane, *Blatchford and Howland's Rep.*, 408-10; 2 Sumner's Rep., 248; *U. S.* vs. *John Matthews*; *U. S.* vs. *White*, *New-York legal observer*, June, 1848, p. 230.

" person employed on board thereof, or on board any other
" vessel of the same country, that to the best of his belief and
" understanding, any seamen or other person is bound to serve
" on board such vessel, according to the law of the country
" to which such vessel belongs, or of the place where such
" seaman or other person was hired, shall be *prima facie*
" evidence that he is legally bound to serve on board such
" vessel, within the meaning of this act, although he has not
" regularly entered into or signed articles of agreement, and is
" not bound by articles of indenture, in the manner required by
" law with regard to seamen and others engaged or bound
" to serve on board british vessels." The mate has been examined as a witness in this case, and has sworn that he considers himself and the other mariners bound to the *Argo* for the term stated in the articles, according to the law of the United States. But even if this court do notice the *lex loci* to ascertain and interpret the contract, in a case of wages, it will be seen that the law of the United States, as declared by an american judge, Winchester, in an early case, Peter's Admiralty decisions, 189, contemplates two species of contract between owners and seamen. 1 For a voyage or voyage; 2 for a term or terms of time. The Plaintiff here has agreed to serve on board the ship for " the term of twelve calendar months," which has not yet expired; he is not, and never was, entitled, under the act of congress, to any descrition of " the voyage," having chosen to enter into the other species of contract; and Flanders, (n° 342) Curtis, (p. 41) and other american authorities agree, that where expressions are made use of clearly authorizing the master to use his discretion as to the intermediate course of the voyage, the courts will not interfere. Moreover, if foreign sailors stipulate in their own country, before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance them in deduction of their wages till they return home, they cannot maintain an action against him for wages in any court but those of their own country; (*Johnson* vs. *Machieslne*, 3 camp. 44) even though the ship and cargo be confiscated in an english port, and the voyage thereby ended (*Gienar* vs. *Meyer*, 2 H. Black, 603.) By the personal contract between the individuals before the court, it is expressly stipulated that the seamen shall not demand or be entitled to their wages until the vessel's arrival at her final port of discharge." It is impossible (to use lord Ellenborough's lan-
" guage in *Johnson* vs. *Machielsne*,) to say that a stipulation
" that the mariners shall not sue the captain for wages in
" foreign parts is void. There may be great reason for pro-
" tecting the captain from suits in foreign countries, where he
" may have no founds to answer the demands of the mariners;

" and it may be conducive to the interests of commerce that " the mariners should have the strongest inducement to remain " in the ship till the adventure is completed. The rate of " wages might be in part determined by the condition that " they were not demandable till the ship's return home. The " agreement was made abroad; but it is transitory: and we " are bound, as far as we are able, to give it the same " construction and effect which it would receive in the coun- " try where it was made." (1)

TASCHEREAU, Justice: Both the English and American courts now exhibit a strong inclination to entertain suits of this kind, where the voyage is terminated, either by its completion or abandonment, or there is a dissolution of the contract by the wrongful act of the owner or master, and will notice the *lex loci* to ascertain the contract. The Act of Congress requires the shipping articles to declare the voyage, or term of service, for which the seaman is shipped; that is, they must declare explicitly the ports at which the voyage is to commence and terminate, whether the contract be entered into for a number of ports or countries, or for a limited time. Wanting a fixed terminus of the voyage, these articles must be held void, and the Plaintiff and other mariners are entitled to recover their wages. As to the stipulation not to demand wages until the vessel's arrival at a final port of discharge, it is of as little legal force as the rest of the articles, for the same reason. (12 *D. T. B. C.*, p. 247.)

JONES and HEARN, for Plaintiff.

DUNBAR, for Defendant.

SAISIE-REVENDICATION par le vendeur.

CIRCUIT COURT, Quebec, 25 April, 1862.

Before: STUART, Justice.

POSTON, et al., *vs.* THOMPSON.

Jugé: Que la saisie revendication par le vendeur en vertu de l'article 177me de la Coutume de Paris, ne peut être valablement pratiquée sans affidavit. (2)

The Plaintiffs having sold and delivered, on credit, certain goods to Defendant, who had since become insolvent, attached

(1) Pritchard's Admiralty Digest., 478, and the authorities there collected: 1 Dodson, 234; 1 W. Rob., 143; 2 Chitty's Gen. Prac., 522; 2 Abbot, 657; The *Aurora*, Bee's (American) Rep., 161; The Nancy, ib. 217; 1 Peters' Admiralty Decisions, (American) 189; Gilpins R., 83, 225.

(2) V. art. 834 C. P. C., et 1998, 1999 et 2000 C. C.

a puncheon of syrup, six boxes of tea, and two bags of coffee, still remaining in his possession, by process of *saisie revendication*, sued out under the 177th article of the *Coutume de Paris*, on merely filing a præcipe fully disclosing their cause of action, as afterwards stated in the declaration. The Defendant, simultaneously with his pleas to the merits, ten days after the return, gave notice of motion to quash the writ, on the ground that it had issued without any affidavit, or the fiat of a judge or other competent officer.

LANGLOIS, in support of the motion, referred to sec. 46, cap. 83; Con. Stats. L. C., whereby it is declared that no process of attachment or writ of *saisie-arrêt* prior to trial (except in the case of the *dernier équipeur*,) shall be issued for attaching the estate, debts and effects of what nature soever, of any person whomsoever, whether in the hands of the owner, the debtor or of a third person, without affidavit.

DUNBAR, for Plaintiffs: If the Court be bound by the authority of decided cases, Defendant's motion must be dismissed. In *Torrance* et al., vs. *Thomas* (1) it was held, by Mondelet J., and, in Robertson et al., vs Ferguson, (2) by the same judge, that process similar to that in this case could not be attacked by motion, an English form, but only by an exception in the usual course of *procédure*, it being an entirely French proceeding. It is also too late for Defendant to complain of a *nullité d'exploit*, after the delay for his doing so in the proper mode, by *exception à la forme*, has expired; nor should he be allowed to make a motion serve the purpose of that preliminary plea. No French authority speaks of an affidavit or fiat being necessary to obtain a *saisie-revendication*; and *Sinclair* vs. *Ferguson*, *Robertson et al.* vs. *Ferguson*, and *Mills et al.* vs. *Ferguson*, (3) by MONDELET, J., and *Leduc* vs. *Tourigny dit Beaudin*, (4) by BADGLEY, J., are decisions expressly in point, that a writ of this description may validly issue without affidavit. The Plaintiffs wholly rely on these cases, and on the law as it stands.

STUART, Justice: The question as to whether the mere expiration of the Bankrupt Act has had the effect of restoring a privilege of which it deprived the unpaid vendor, is not free from difficulty, but there can be no doubt that, in this district, the invariable practice, for fifty years, has been not to issue any process of attachment before judgment without affi-

(1) 6 R. J. R. Q., p. 400 et 402.

(2) 6 R. J. R. Q., p. 227.

(3) 6 R. J. R. Q., p. 227.

(4) 9 R. J. R. Q., p. 97.

davit. This practice has been sanctioned by judges whose ability and learning we all recognize, and I am not disposed to disturb it, to conform to decisions is another district of recent date. "The practice of the Court is the law of the Court," as lately stated by one of the judges in appeal, and should be regarded as such. Nor can I overlook the danger of permitting the issue of an attachment to retake possession of goods which a Plaintiff himself admits he has sold and delivered, on a simple allegation of Defendant's insolvency; or the fact that the statute cited makes an exception, as to the *dernier équipeur*, thereby implying that every other case is included within its requirement. Motion absolute. (12 *D. T. B. C.*, p. 252.)

SECRETAN and DUNBAR, for Plaintiffs.

CASAULT and LANGLOIS, for Defendant.

CAPIAS.—APPEL.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16th June, 1862.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., MEREDITH J., MONDELET, Justices.

GUGY, Appellant, *and* FERGUSON, Respondent.

Jugé : Qu'un appel peut être interjeté d'un jugement rendu en vacance par un juge de la Cour Supérieure, ordonnant la libération, en vertu des dispositions de la 12me. Vic., cap. 42, sec. 2, d'un Défendeur détenu en vertu d'un writ de *capias ad respondendum.* (1)

The Respondent was arrested under a writ of *capias ad respondendum* at the suit of Appellant. He presented a petition to a judge of the Superior Court in vacation, under the provisions of the 12th Vict. Cap. 42, sec. 2, and prayed to be discharged out of custody. This petition was granted by a judge of the Superior Court, in vacation, on the 12 of June, 1862, Plaintiff (Appellant) persuant to notice, moved the Court of Queen's Bench, for leave to appeal from the judgment granting the above petition.

ANDREWS, for Appellant, argued: That an appeal lies from any interlocutory sentence or judgment carrying execution or ordering something to be done which could not be remedied by the final judgment to be rendered in the cause. That the court had already decided that an appeal could be had from an interlocutory judgment rejecting the petition of Defendant. He referred the court to the case of *Blackensee* and *Sharpley*, reported in the L. C. Jurist. vol. 3, p. 292. That

(1) V. art. 823, 1115 et 1116 C. P. C.

if the one party had a right of appeal, it could not be denied to the other.

PARKIN showed cause against the application, and urged that, by law, no appeal existed in this case; that the act entitling parties to appeal from interlocutory judgments specified from what sort of judgments appeals could he had, and that the preaent case was not included. That the judgment in appeal, should the ruling of the judgment in vacation be reversed, could not be executed, as a party once discharged from custody could not be again arrested.

MONDELET, Justice *dissenting*: The question here presented is, whether or not the right of appeal exists. This court should not grant an appeal, unless the right of appeal is clear. The court cannot be governed by any argument *ab inconveniente* and ought not to be deterred from its duty by any consequences which might ensue: there are no presumptions in cases of jurisdiction. The objection to the appeal in this case is in the nature of an *exception déclinatoire*, and the court, before granting the appeal, must be satisfied that it lies. The law, Con. Stat. Lower Canada, cap. 80, sec. 8, p. 810, clearly establishes the right of appeal, had the judgment, from which it is desired to appeal, been that of the court; but it is by no means so clear in the case of a judgment rendered by a judge in vacation. If the right of appeal be doubtful, the appeal should not be granted. If the law is clear, the appeal should be allowed.

DUVAL, Justice: In 1849, summary jurisdiction in certain cases was given to judges in vacation. Before the passing of the act of that year the right of appeal was admitted by all. Are we now to deprive a Defendant of a right he had previous to the enactment of a law which was passed purely in his interest and for his benefit? Is a man to be allowed to rot in gaol, witout an appeal, when, in an action involving a sum of £25 0 0 he could obtain one? Where I ask is the difference between a *capias ad satisfaciendum* and a *capias ad respondendum?* In the former case, an appeal was always allowed; then, if Defendant has the right to appeal, the other party must also have it. I entertain no doubt that the appeal lies, not only according to the spirit of the law, but also according to its very letter.

MEREDITH, Justice: In the case of *Blackensee* and *Sharpley* cited by Appellant, the point now raised was expressly decided. The legislature never intended to give a single judge greater powers than the court itself. If the power exercised in this case is given to the judge as well as to the court, it must be that he has the power, subject to the same revision of his judgment as there would have been had the judgment

been rendered by the court. It is not a *quasi* ministerial act of his, but a judicial one; it differs not in any way from an act of the court itself. The whole of the powers of the court have been transferred and extended to the judge.

Sir L. H. LAFONTAINE, Bt. Chief Justice: The parties are in the same position before the judge in vacation as before the court itself. If the judgment had been rendered by the court, the appeal would certainly lie, then, why should the right of appeal be denied from a judgment rendered by a judge in vacation holding powers equal and similar to those of the court.

JUDGMENT: Leave to appeal granted. (12 *D. T. B. C.*, p. 254.)

ANDREWS and ANDREWS, for Appellant.

PARKIN and PENTLAND, for Respondant.

MUR MITOYEN.

SUPERIOR COURT, Quebec, 3rd June, 1862.

Before: BADGLEY, Justice.

MCKENZIE *vs.* TETU et al.

Jugé: Que la mitoyenneté entre propriétés contigues est une présomption de droit qui impose sur celui qui y objecte la nécessité de la repousser; que l'objection ne peut être établie que par titres, ou à défaut de titres par certaines marques; que, dans l'espèce, il n'existe ni titres ni marques établissant mitoyenneté dans le mur en question; mais que la non-mitoyenneté est établie par titre entre le Demandeur et les Défendeurs, par lequel ces derniers admettent que le Demandeur est le propriétaire du mur, (1)

BADGLEY, Justice: This constestation rests upon Defendants' alleged right of *mitoyenneté* in the north gable wall of Plaintiff's house fronting on St. Peter street, the adjoining lot to which Defendants acquired, and for their purpose of erecting thereon a warehouse, took possession, as of right, of the wall in question, and demolished and rebuilt a part thereof. The Plaintiff demands the restoration of the wall as having been his sole property and in his possession at the time of the alleged trespass, which Defendants deny and oppose to him their right of *mitoyenneté* and their justifiable legal right to use the wall, offering to pay the usual legal indemnity *de six toises l'une.* The contestation is strictly upon the question of *mitoyenneté.* As to the law of the case, it suffices at present to observe, generally, that separation or division walls are presumed to be common, *mitoyens,* between

(1) V. art. 510 C. C.

neighbours, upon grounds of public necessity, and for the prevention of contests between them ; this legal presumption is however subject to be rebutted. From the documentary evidence of record, Plaintiff's title of property reverts to the sheriff's deed of the 22nd April, 1830, to Phillips and others, who, by notarial deed of sale, sell and convey to Plaintiff, on 12th February, 1833, a lot of land fronting on St. Peter street, of 41 feet 6 inches, English measure, or thereabout, by 90 feet 6 inches in depth, or thereabout, bounded on the north side by Ross, on the south by Duchesneau, with a large three stories house erected thereon, with passage for communication between the yard of the lot and the adjacent lane leading from St. Peter street to the river St. Lawrence. The Defendants' title also reverts to a sheriff's deed of the 6th June, 1846, under *décrêt*, against the property of Ross and others, of two lots of land, therein described adjudged to James Gibb, and by whom, by deed of promise of sale of the 9th April, 1853, the second lot (2o) was conveyed to Defendants. It is necessary to describe these lots as stated in the sheriff's deed. 1o. A lot on St. Peter street, of 15 feet 2 inches, French measure, in front, by 71 feet in depth, bounded in rear by James Gibb, on the north side, by the gable wall of Glackmeyer's house and store, and, on the other side, by the house, yard and store described in lot n° 2, the division walls of the last mentioned house *mitoyen* with n° 1 ; together with a stone house erected on front of n° 1, and over the passage reserved for the use at all times in common between the proprietors of said lot n° 1, and the properties in the rear and on both sides thereof. 2o. A lot of 30 feet 2½ inches, or thereabout, in front, on St. Peter street, by 71 feet in dept, bounded in rear by said James Gibb, on the north by said lot n° 1, with which the division walls are *mitoyens*, and, on the other side by James McKenzie, (to wit, Plaintiff) with the house, store and stable thereon erected, and the right of passage &c., under the adjoining house on the north side. (to wit, n° 1) By the deed from Gibb to Defendants, they acquired the above described lot n° 2, with the right of passage as above, and also another lot contiguous to, and in rear thereof, of 31 feet, or thereabout, in front, by about 65 feet in depth, with the house and other buildings thereon, bounded in front by the first lot sold to them. on the north side, by the said passage, and, on the south and east, by Thos Gibb. The side lines of these respective properties, as stated, are not disputed, they must be assumed to be right lines without divergence from front to rear. It may be here observed that the fronts of the respective lots of Plaintiff and Defendants are fully covered by the houses stated to be erected thereon ; that the only walls referred to in the deeds as *mitoyens* are those

between the property acquired by Defendants from Gibb, and his retained property adjoining the Glackemeyer property &c., and that no *mitoyenneté* in Plaintiffs' gable is mentioned in any of the deeds above referred to. As previously stated, Defendants acquired their property to erect thereon a store or warehouse, and, in prosecution of their purpose, found it expedient to make an agreement with Plaintiff, on the 9th May, 1853, for the purchase from him of a strip of ground running from the rear of his house for the erection of the warehouse wall. It was agreed between them that, as Defendants were about purchasing from James Gibb ground and premises adjoining the premises of Mckenzie, known as the present Trinity-house, and intended to build a store thereon &c., " they propose to purchase from him a small strip of *his* ground *on the line of division between their respective properties*, and likewise to pull down the rear wall of his stables and hangard in order to rebuilt the same of a greater width *upon the ground which they desire to purchase from him for that purpose;*" and Mckenzie agrees to sell to them, at the rate of 9s. per foot in superficies, of the ground which may be so found, " a sufficient width of ground along the depth of his lot to enable them to construct a wall of 27 inches english measure in thickness, *including the ground upon which the present wall is built, and which wall and ground belong solely to James McKenzie, and form the rear of his stables and hangard already mentioned,*" and " they agree to take down the present wall and to build instead a new wall of the said width of 27 inches, and 58 feet high, *commencing in the rear of the Trinity House upon the line of division* between the said properties, and continuing the whole depth of Plaintiff's land;" and further Defendants agree " that the face of the said wall towards their own side shall be parallel to and in a line with the gable of the Trinity House, as the present wall is, and that the new wall, when built, as well as the ground upon which the same is erected, shall be *mitoyen* and common between them, as if each had paid for and contributed half towards the same, &c.;" the new wall to be erected at the sole expense of Defendants, and the stables to be reinstated in the same good order, and also upon their payment for the privilege and purchase then acquired at the rate per superficial foot above mentioned. In elucidation of the difficulty, a reference to a surveyor was ordered to establish; 1st the thickness of the disputed wall; 2nd and 3rd, the frontage or extent of the respective properties of Plaintiff and Defendants, exclusive of that thickness; and 4th, the situation of the division wall mentioned in the agreement of the 9th May, 1853, in rear of the disputed wall, as it was on and previous to that date. The report, with plan annexed,

shews the following measurements in english measure: from Glackmeyer's wall to the north gable of Defendant's store, 16 feet; the frontage from outside of Defendant's north gable to the inside of the disputed wall, 33 feet 4 inches, equal to 31 feet 3 inches, french measure, as by the report; the thickness of the disputed wall 3 feet 2½ inches; the frontage of Plaintiff's lot, exclusive of that thickness, 38 feet 8 inches, and the thickness of the division wall in rear, stated in the agreement, 2 feet 1½ inches. The Defendants' inside face of the new or division wall is in a right line with the inside face of the disputed wall of the Trinity House, Plaintiff's property. Now the report shews the respective frontages as follows: 1o. Plaintiff's front, exclusive of the disputed wall, 38 feet 8 inches, inclusive, 41 feet 10½ inches. His deed gives him 41 feet 6 inches, or thereabout; 2o. Defendants' front, exclusive of disputed wall, 33 feet 4 inches, equal to 31 feet 3 inches, French measure, inclusive of disputed wall, 35 feet 6¼ inches, English. Their deed gives them 30 feet 2½ inches, without naming what measure. Hence, in any case, Defendants' alleged claim would exceed very considerably their purchase from Gibb, whether their 30 feet 2½ inches, in front, be French or English measure, whilst Plaintiff's property would be reduced by some feet if Defendants' claim prevailed. The oral evidence of their excess of ground in front is corroborated by the Report, and establishes the fact that the outside of Plaintiff's division wall towards the rear of his premises was in a right line with the disputed wall of the Trinity House. That evidence also establishes, that, although the original houses of the parties mentioned in their respective deeds of acquisition were adjoining, the wall of Plaintiff's house in no way supported the house on Defendants' property, not even at the roof; that the rafters or beams of Defendants' house ran from front to rear, and not from end to end, or into Plaintiff's gable; that Plaintiff's wall was perfectly flush, without fire places, chimneys, cup boards or pipe holes in it, and without openings of any kind, such as are generally found in *mitoyens* walls; that the *coupefeu* on the top of the division wall was flat, and the cover on it was also flat without inclination to either side; and finally that none of the usual legal *indicia* of *mitoyenneté* mentioned by jurists, have been shewn to exist or to have existed. It is true that a cavity in the wall, discovered only when the wall was taken down was found, of about 3 feet high, 2 feet broad, and about 15 inches deep, in a front room of the first story, but that, and the painting of the front wall are surely in themselves not proof of the right claimed, which, Defendants' testimony is altogether unsatisfactory to support. The Defendants' claim

rests therefore altogether upon the legal presumption invoked by them, their title has not given it to them, the *indicia* of *mitoyenneté* are wanting, and, even without the wall in dispute, they hold larger frontage than their title has conveyed to them. Now the legal presumption of *mitoyenneté* is indisputable, "la communauté des murs est si favorable en "France qu'on présume toujours qu'elle existe à l'égard d'un "mur joignant, sans moyens, deux héritages contigus, à moins "que le contraire ne soit prouvé." "Mais la présomption qui "fait regarder comme mitoyen un mur joignant sans moyens "deux héritages, cesse lorsque le contraire est attesté par les "titres. Cette décision est conforme aux principes sur les "présomptions de droit: elles ne servent qu'à défaut de titres. "Mais ce qui est particulier à cette matière, c'est que les "titres peuvent être remplacés par certaines marques qui se "trouvent aux murs de séparation." "Il est bon d'observer "que la loi n'exige aucune preuve, et n'indique aucune "marque, pour constater la mitoyenneté d'un mur: car elle "est présumée exister de plein droit. Il n'est donc besoin de "preuve que pour détruire cette présomption. Or les preuves "que la loi admet sont d'abord les titres, et, à leur défaut, "certaines marques présentées par le mur lui-même, qui "sont de trois espèces, le chaperon à une seule pente du "côté du réclamant propriétaire, des filets de pierre cons-"truits avec le mur, et placés de son côté, et des corbeaux "placés dans le mur du côté du dit réclamant du mur. "D'ailleurs, puisque des marques dans un mur sont ad-"mises pour servir de titre, il est naturel de faire exprimer "par les marques ce qui serait écrit dans un titre &c." These authorities are taken from the Nouveau Desgodets par Lepage, vol. 1, pp. 43 et seq.: Marks of *mitoyenneté* are less satisfactory than titles, and indeed are only suppletory of them; in this case there are none of the marks in the disputed wall, and the proprietory titles of both Plaintiff and Defendants make no mention of *mitoyenneté* in this wall. It is said "ainsi, lorsqu'un mur qui sépare deux héritages ne porte des "bâtiments que d'un côté, et s'ils emploient toute la hauteur "du mur, il n'y a pas de présomption de mitoyenneté, ce mur "est censé appartenir en totalité au propriétaire du bâtiment." That presumption ceases if the wall support buildings on each side of it, or at least to the height of the lower one so supported: but, in this case, it is proved that Defendant's house received no support whatever from the wall in dispute, in fact no more than if the premises had not been contiguous; moreover, in this case, there is a title between the parties containing admissions by and against Defendants themselves, which cannot be overlooked or set aside. This is the case, of

" si aucune marque n'existe, nul doute que la présomption de " mitoyenneté qui en résulte serait détruite par le témoignage " des titres qui diront que le mur appartient en entier à l'un " des voisins." It will be remembered that Plaintiff's purchase was of 41 feet 6 inches, or thereabout, in front, by 90 feet 6 inches in depth, with the house, &c., thereon, that this house with its gable wall, &c., covered the whole frontage, that the north side line of the lot was a right line running from front to rear, on the outside of the wall in dispute. By the agreement of the 9th May, 1853, Defendants purchase from Plaintiff, " a strip of *his ground* on the line of division between their respective properties," " along the depth of his lot " " commencing in the rear of the Trinity house upon the line of division between the said properties, and continuing the whole depth of McKenzie's land." Now what was the line of division between their properties if not the right line from St. Peter street in front, to the depth of McKenzie's lot outside of his house gable, and along outside of the wall of his stable and hangard? No other than the existing line as it was between the properties at the date of the agreement proposed by Defendants to McKenzie, and acceded to by him, namely; the line of wall outside or at the back of his house, stables and hangard, the rear wall of McKenzie's stables and hangard which Defendants agree to pull down and to rebuild of greater width upon the ground to be purchased " to wit: McKenzie's ground, " to enable them to construct a wall of 27 inches in thickness, including the ground on which the present wall is built, and which wall and ground from the rear wall of the stables and hangard already mentioned, shall be *mitoyens*, &c.," and " *which wall and ground belong solely to James McKenzie;* " the new wall to be so " built to be in a line with the gable wall of the Trinity House." The acknowledgment of Plaintiff's property, in this portion of the north side right line is conclusive and can leave no reasonable doubt of his property in the wall in dispute. There is therefore no *mitoyenneté* in that gable wall, as claimed by Defendant's and they must pay to make it so. Under these circumstances, an *expertise* is ordered to ascertain and establish the value of the *mitoyenneté* right in the disputed wall, previous to rendering the final judgment. (12 *D. T. B. C.*, p. 257.)

VANNOVOUS, for Plaintiff.

TASCHEREAU, for Defendant.

ARRET SIMPLE.—EXCEPTION A LA FORME.

BANC DE LA REINE, EN APPEL, Montréal, 6 septembre 1861.

Présents : Sir L. H. LAFONTAINE, Bart., juge en chef, AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

LESLIE, *et al.*, Appellants, et MOLSON'S BANK, Intimée.

Jugé : Qu'un arrêt-simple peut être contesté par exception à la forme, indépendamment de la contestation qui peut se faire sur l'assignation pour simple condamnation. (1)

Le jugement dont était appel est un jugement interlocutoire rendu par la Cour Supérieure, à Montréal, le 31 mai 1860, renvoyant une exception à la forme produite par les Appellants : Le 16 mars 1860, un bref de saisie-arrêt avant jugement sortit de la Cour Supérieure, à Montréal, à la poursuite de l'Intimée, sur l'affidavit de William Sache, caissier de la banque, affidavit rédigé dans les termes ordinaires, suivant les dispositions du statut 25 Geo. III, ch. 2, sec. 10, (p. 96, statuts revisés, ed. anglaise.) Après le rapport de l'action, et la saisie effectuée, les Appelants attaquèrent cet *saisie-arrêt* par motion et par exception à la forme. Par leur motion, ils se plaignaient de l'irrégularité et de l'insuffisance de l'affidavit de Sache. Par leur exception ils exposaient : 1° Que cet affidavit était irrégulier et insuffisant ; 2° que les allégations qu'il renferme que le déposant était informé d'une manière croyable, et qu'il croyait réellement en sa conscience que les Défendeurs avaient recélé, et qu'ils étaient sur le point de recéler, leurs biens, dettes et effets, dans le but de frauder leurs créanciers, et nommément l'Intimée, étaient faux ; 3° que les Appelants s'étaient toujours conduits d'une maniére légale, franche et ouverte envers leurs créanciers et envers l'Intimée, et qu'ils leur avaient donné toutes les facilités pour leur faire connaître l'état de leurs affaires ; 4° qu'ils n'avaient jamais recélé leurs biens, dettes et effets, ni été sur le point de le faire dans le but de frauder leurs créanciers. Les Appelants, dans cette exception, concluaient à ce que cette *saisie-arrêt avant jugement* fût déclarée illégale et nulle, et qu'elle fût rejetée avec dépens. L'Intimée répondit à cette exception qu'elle était mal fondée en droit : 1° Parce que le writ de saisie-arrêt était légal en sa forme, ainsi que l'exploit d'assignation, et l'exception irrégulière, contraire à la loi et à la pratique ; n'ayant rapport qu'à l'affidavit, et nullement à la demande, au bref, ou à l'assignation ; 2° parce que l'exception ne démontrait en aucune manière que la cour ne pouvait procéder à adjuger sur la demande, ni forcer

(1) V. art. 819 et 854 C. P. C.

les Appelants à y répondre sur le mérite ; 3° parce que l'exception ne faisait pas voir que le bref d'assignation, (*summons*) ni la déclaration ou demande de l'Intimée, ni l'assignation étaient nuls ; 4° parceque les allégations contenues dans l'exception étaient insuffisantes pour justifier les conclusions.

La motion des Appelants fut rejetée le 30 avril 1860. Il n'y eut pas d'appel de ce jugement. Après audition sur la défense en droit produite à l'encontre de l'exception à la forme, la Cour Supérieure (l'honorable M. le juge-assistant MONK, présidant) rendit, le 31 mai 1860, le jugement qui suit, maintenant la défense en droit, et déboutant l'exception à la forme des Appelants : "The court doth maintain the answer in law, and, in consequence, doth dismiss the *exeeption à la forme.*" C'est de ce dernier jugement qu'appel fut interjeté le 14 juin 1860. Les Appelants, dans leurs griefs d'appel produits le 18 août 1860, demandent l'infirmation de ce jugement. 1° Parce que l'exception préliminaire était bien fondée en loi, et que la Cour Inférieure aurait dû permettre aux Appelants de faire la preuve des allégations de faits qu'elle contenait ; 2° parceque les Appelants par leur exception préliminaire attaquaient la vérité des allégations contenues dans l'affidavit au moyen duquel avait été émané un bref de saisie-arrêt avant jugement et demandaient la nullité de la saisie-arrêt comme ayant été prise sans cause raisonnable, et que ce procédé était parfaitement légal et justifié par notre système de procédure en pareille matière.

DORION, pour les Appelants : " Deux questions ont été soulevées. La première qu'il suffit à un créancier qui veut obtenir une saisie-arrêt de déclarer sous serment qu'il est informé d'une manière croyable que son débiteur est sur le point de recéler ses biens pour frauder ses créanciers, sans mentionner la source de cette information ; et la seconde, s'il est permis au débiteur dont le caractère et la fortune sont attaquées, de prouver la fausseté de l'allégation et de démontrer que les faits ne justifient nullement le procédé qui a été adopté. La différence qui existe entre notre manière de procéder pour contraindre les débiteurs au paiement de leurs dettes, et ce qui était suivi sous le droit français, fait que l'on ne trouve à peu près rien dans les anciens auteurs qui soit applicable aux procédés sur la saisie-arrêt avant jugement, telle qu'elle est autorisée par nos statuts provinciaux. Autrefois, le terme de saisie-arrêt s'appliquait presqu'exclusivement à la saisie-arrêt en *mains-tierces.* (1) Les facilités qu'offrait alors la loi de procéder par voie de saisie-exécution, même avant

(1) Guyot, Rép., de Jurisp., vbo *Saisie-Arrêt ;* Pandectes Françaises, t. 18, p. 143 ; Bourjon, t. 2, p. 669.

jugement, rendaient très rares les cas où il était nécssaire de procéder par saisies-arrêt pour saisir les meubles en la possession du débiteur ; de là l'absence de règles précises sur cette matière. Ce qui paraît certain, cependant, c'est que pour faire usage de la saisie-arrêt, le créancier qui n'avait pas de titre de créance devait obtenir la permission du juge sur une requête à cet effet. Le juge pouvait accorder ou refuser cette permission, suivant les circonstances, mais sa décision, quelle qu'elle fût, était sujette à révision, conformément à l'art. 2 du tit. 35 de l'Ordonnance de 1667, comme l'étaient tous les jugements et ordres prononcés sur requêtes non communiquées. (1) Sous le droit nouveau comme sous l'ancien, le juge peut dans sa discrétion, accorder ou refuser au créancier qui n'a pas de titre, la permission de saisir et arrêter les créances dues à son débiteur; mais le tribunal saisi de la contestation peut toujours mettre de côté l'ordonnance du juge si elle a été donnée sans cause suffisante. (2) Lorsque l'usage des exécutions forcées fut aboli dans le pays, la législature décréta que des saisies-arrêts avant jugement pourraient néanmoins avoir lieu sous l'affidavit du créancier, qui serait obligé de déposer de certains faits à la satisfaction d'un juge. (3) L'on a conservé le *fiat* du juge qui était autrefois exigé pour les saisies-arrêts de la part du créancier sans titre. Ce *fiat* pouvait autrefois être soumis à la révision de la cour, et rien ne semble avoir abrogé cette autorité qu'exerçait le tribunal saisi de la contestation. Il est vrai que, depuis quelques années, l'on a substitué l'ordre du greffier à celui du juge, mais loin de diminuer l'importance de conserver aux parties le droit de se plaindre qu'une saisie-arrêt a été décernée sans cause, il semble que ce changement ne fait que l'augmenter. Les codes étrangers qui ont adopté la procédure sur saisie-arrêt à peu près telle qu'elle se pratique ici, ont protégé d'une manière toute spécial, les droits et les intérêts du saisi. Ainsi, à la Louisiane, où le créancier, avant d'obtenir une saisie-arrêt avant jugement, est obligé de donner caution pour les dommages qu'il pourrait occasionner au saisi, l'article 258 du Code de Procédure permet au débiteur de contester la vérité des allégués de l'affidavit, et l'article 742 du Code de Procédure de New-York, fait également une réserve expresse du droit de contester la saisie-arrêt avant jugement, par motion et affidavits. Cette permission de produire des affidavits, fait voir qu'il ne s'agit pas seulement de moyens

(1) Rodier, *Com. sur l'Ord.* 1667, pp. 699 et 700 ; Pigeau, *Proc. Civile*, t. 1. p. 658.

(2) Art. 558, Code Civil ; Nouveau Pigeau, t. 2, pp. 64 and 65 ; Roger, *de la saisie-arret*, pp. 84 et suiv., Nos. 146 à 149.

(3) Ord. 27 Geo. 3, ch. 4, sect. 10.

de forme, mais que le débiteur peut contester les allégués mêmes qui ont été faits par le Demandeur pour obtenir la saisie-arrêt. Ainsi partout où cette procédure a été acceptée, l'on a facilité au débiteur les moyens de la repousser. C'est que partout, l'on a considéré que la saisie-arrêt avant jugement était un procédé rigoureux, une exception au droit commun, et qu'elle devait être restreinte dans ses plus strictes limites. Si telle est la loi et la jurisprudence même dans les endroits où l'on a conservé l'exécution parée, à plus forte raison, la même pratique devrait elle être suivie ici. Le but du législateur, en faisant cette exception au droit commun, qui veut que le créancier ne puisse faire saisir les biens de son débiteur qu'en vertu d'une sentence ou jugement émanant d'une autorité compétente, a été de protéger les créanciers contre la fraude de leurs débiteurs, mais, s'il n'y a pas de fraude, il doit être permis au débiteur de le prouver, puisque la fraude est la base du droit de créancier. Si cette preuve ne lui est pas permise, il faut admettre que la loi sanctionne une procédure par laquelle il sera toujours au pouvoir d'une partie de se créer un droit, de s'assurer un recours si exceptionnel qu'il ne sera pas même au pouvoir de la partie lésée dont le caractère et la fortune sont en jeu de le repousser en prouvant la fausseté des causes qui l'ont motivé. Cette pratique n'est certainement pas celle du droit français. L'on a prétendu que cette pratique était celle que l'on suivait en Angleterre relativement aux *capias ad respondendum*. Mais, outre que l'on ne doit pas appliquer à la saisie-arrêt, qui est une procédure toute française, les règles et les principes du droit anglais, auquel elle est étrangère, puisque ce procédé est tout-à-fait inconnu en Angleterre, il faut dire que la pratique n'est pas telle qu'on la représente, et que, chaque fois qu'il a été établi que le débiteur arrêté sur *capias* n'était pas coupable de la fraude qui lui était imputée dans l'affidavit, il a été libéré. Les causes dans lesquelles cette question s'est présentée sont rares, il est vrai, parce que les créanciers ne s'exposent que rarement à un serment téméraire, mais elles sont en nombre suffisant pour établir une jurisprudence incontestable sur ce point. Le fait qu'un statut a été récemment passé qui permet au débiteur arrêté sur *capias* de se faire libérer sur requête à cet effet, en prouvant la fausseté des allégations de l'affidavit sur lequel le *capias* a été émané ne milite pas non plus contre la prétention des Appelants. Ce statut n'a fait que règlementer la manière de contester le *capias ad respondendum*, en augmentant les facilités qui existaient déjà de le faire. Et, en supposant même qu'il aurait changé le droit qui existait auparavant, l'on pourrait tout au plus dire que la législature a compris la nécessité d'assimiler la procédure sur le *capias ad respondendum* empruntée au droit anglais, aux règles de la

procédure française, en permettant au débiteur de faire précisément ce qu'il aurait eu le droit de faire dans une procédure analogue en vertu de l'article déjà cité de l'ordonnance de 1667, mais que, relativement à la saisie-arrêt, nulle disposition nouvelle n'était nécessaire, puisque cette procédure dépendait déjà de la procédure française. Les Appelants soumettent que le jugement de la Cour Supérieure est, pour les raisons ci-dessus, mal fondé, et qu'en le réformant de manière à leur permettre de prouver la fausseté des allégations de l'affidavit sur lequel cette saisie-arrêt a été obtenue, elle ne fera que leur rendre justice. Sur l'autre question soulevée, les Appelants se contentent de remarquer, que le moins que l'on doive exiger du créancier qui veut faire arrêter les biens de son débiteur sans jugement, c'est qu'il mette le juge en état de décider s'il a des raisons suffisantes de croire que le débiteur est sur le point de le frauder en se dénantissant de ses biens, ce que ne fait pas voir un affidavit en termes généraux, comme l'est celui produit en cette cause.

LAFLAMME, pour l'Intimée: "L'exception à la forme ne peut être proposée qu'en autant qu'il existe dans l'exploit quelque vice ou informalité suffisante pour entraîner la nullité des procédés. Dans la présente cause, les Appelants ne peuvent se plaindre de la nullité de la forme de l'affidavit qui est parfaitement régulier. Ils ont, au début de la cause, fait motion pour rejeter l'affidavit et les procédés, et la Cour a rejeté cette motion, déclarant, par là même, l'affidavit régulier. De ce jugement il n'y a eu aucun appel. La loi prescrit certaines formalités à suivre pour l'émanation d'un bref de saisie-arrêt avant jugement. Dès que ces formalités ont été accomplies, la procédure est régulière et ne peut être attaquée par la voie d'une exception à la forme. La demande est régulière ainsi que l'assignation. Les Appelants ne s'en plaignent pas, ils n'invoquent sur ce point aucun moyen de nullité, parce qu'il n'en existe aucun, seulement ils nient l'allégation de fraude contenue dans l'affidavit et cela par voie d'exception à la forme, jamais notre jurisprudence n'a sanctionné cette pratique, et les Appelants ne peuvent invoquer aucun précédent pour l'appuyer. La saisie-arrêt avant jugement est un procédé conservatoire. Pour l'obtenir, il faut un affidavit, c'est là la preuve ou la présomption de fraude voulue par le statut pour donner lieu à l'émanation de la saisie. Si la saisie émane on ne peut contester la légalité de l'émanation qu'en autant que cet affidavit est défectueux en sa forme, ou que le saisissant n'avait pas de créance, si l'affidavit contient des faits faux et injurieux, le Défendeur a son remède au criminel et au civil. Si le Demandeur n'avait pas de créance, la saisie tombera, ou, s'il était non justifiable à donner l'affidavit

il est passible de dommages et intérêts en réparation. Un créancier peut même obtenir cette saisie-arrêt en donnant un affidavit constatant, outre sa cause de dette, la déclaration qu'il est *informé d'une manière croyable* que le Défendeur est sur le point de recéler. Si une simple information, d'après la loi, suffit pour assurer au créancier le droit de saisir-arrêter son débiteur, la vérité du fait communiqué ne peut donc pas être mise en question, mais seulement l'information même, ce qui démontre que le Défendeur, sur une saisie-arrêt, ne peut mettre en question la fraude qu'on lui impute pour en exiger une preuve ultérieure ou plus complète que celle établie par l'affidavit."

MEREDITH, J., *dissentiens:* I perfectly agree with the other Judges of this court in tinking that the question presented for our consideration, is to be determined by our own common law, and not by the law of England ; and that, under our common law, a Defendant whose goods and chattels are attached under a *saisie-arrêt* before judgment, has a right to deny, and if he can, disprove the charge of fraudulent conduct upon which the attachment issued, and thereupon to have it set aside. Indeed it would require nothing less than the express provision of a Statute to induce me to say that a Defendant whose property has been attached, upon a charge of fraud, should not be allowed to repel the charge made against him, so as to regain the control of his property ; and the learned Chief Justice has most satisfactorily shown that there is nothing in our provincial laws, to deprive a Defendant of the right to which I have adverted. But, at the same time, that I, unhesitatingly, admit the existence of this right, I do not think it is one that can be exercised by an exception as to form. An *exception à la forme*, as the very name indicates, is an exception as to the regularity or form of the proceeding by which the Defendant has been impleaded. In the present case the law requires an affidavit in a certain form to be filed ; and an affidavit in due form has been filed ; there is therefore, I think, nothing irregular in the form of the Plaintiff's proceedings. It is thought, however, that a Defendant has a right, by exception as to form, to impugn the truth of the affidavit, as to the fraudulent conduct with which he is charged, in order to show that the process has not issued regularly. It seems to me, however, that that view cannot be maintained. According to the Statute an affidavit for a *saisie-arrêt* must contain two essential allegations, firstly, that a debt of a certain amount is due by the Defendant, secondly that the Defendant has been guilty of fraudulent conduct of a certain kind. It would not, I think, be contended that a Defendant could put in issue the first of these allegations by

an exception as to form, and I see no reason for saying that the second of the two allegations could be denied by an exception as to form, that could not, with equal force, be urged with respect to the first. It seems to me, upon principle, that a Defendant has the same right upon the merits, to deny the charge of fraud urged against him, as he has to deny the debt which he is alleged to owe; and if the charge of fraud can be denied by a plea to the merits, it seems to follow that it cannot be denied by an exception as to form; because the same matter cannot be the subject of a plea to the merits, or of an exception as to form indifferently. I am not by any means prepared to say that an order for an attachment may not be regarded as suggested by the learned Chief Justice, as an *ordonnance de Juge sur requête non communiquée;* or that under certain conditions a Defendant ought not to be allowed to complain of such an order by opposition or petition, but I do not think that such an opposition or petition could be deemed an *exception à la forme.* I am therefore of opinion that the judgment of the court below ought to be confirmed, but that our judgment ought to be so worded as to show that we admit the right contended for by the Defendants.

C. MONDELET, J.: I have never entertained the slightest doubt as to the nature of the proceeding we have seen practised in our courts, I mean the *saisie-arrêt avant jugement* under the operation of our provincial ordinance of 1787, c. 4, s. 10. It is merely and essentially a *procédé suivant la loi française.* It does not in the least partake of the character of the *capias ad respondendum* such as regulated by 25 Geo. III, c. 3, s. 4. That procedure should therefore be met at once by a preliminary plea as has been done in this case. We are not trying the validity of the claim, but merely whether the *saisie-arrêt* has been duly or rather regularly issued and carried out. In such a case the *exception à la forme* was the the correct course. As to whether there should be two witnesses *(preuve légale)* we have nothing to do with that now. It may come up later when we are called upon to decide upon the merits of the exception. I am therefore without any hesitation in my opinion that the judgment of the court below should be reversed.

Sir L. H. LAFONTAINE, Bt. Juge-en-Chef: Saisie-Arrêt avant jugement, émanée le 16 mars, 1860, contre les Appelants et entre les mains de trois tiers saisis, ainsi émanée sur l'affidavit de William Sache, caissier de la banque. Le 5 avril, les Défendeurs présentent une exception à la forme. Le 20, motion des mêmes, à l'effet de faire déclarer non valablement émané le bref de saisie-arrêt et de l'annuler, "inasmuch as no sufficient proof upon oath, that Defendants, at the time of, or

previous to the issuing of the writ of attachment or *saisie-arrêt* before judgment, were immediately about to secrete their estate, debts and effects, was made previous to the issuing of said writ of attachment." Le 25. les Défendeurs sont forclos de plaider au *mérite* de l'action, et acte de cette forclusion en est donné à la banque Demanderesse. Le 30, la motion faite le 20 est rejetée. Le 16 mai, la Demanderesse répond à l'exception à la forme. Le 25, Réplique à ces réponses. Le 31, la réponse *en loi* à l'exception est maintenue, et l'exception est déboutée. De la part de l'Intimée, saisissante, il nous a été exposé qu'elle avait procédé sous l'autorité de la 10e section de l'ordonnance 27, Geo III, ch. 4., et pour combattre l'exception à la forme des Défendeurs, elle argumente de ce qui a lieu dans le cas du *capias ad respondendum*. Il faut donc comparer les deux lois et voir si elles renferment des dispositions semblables. Pour qu'il pût y avoir lieu à l'émanation d'un *capias ad respondendum*, l'ord. de la 25e Geo. III sect. 4, exigeait un "serment" ou "affidavit" (textes français et anglais). Ce mode de procédé était emprunté au système anglais, ce qui explique pourquoi les autorités tirées des décisions anglaises sont si souvent citées en matière de *capias*. Il fallait que par le "serment" ou "affidavit" le juge fût satisfait que le Défendeur était personnellement endetté, qu'il était sur le point de quitter la province, et que, par ce départ, le Demandeur pouvait être privé de son recours contre lui. C'est deux ans plus tard qu'a été promulgué l'ord. de la 27e Geo. III, ch. 4, dont la 10e section porte qu'il ne sera donné à l'avenir aucun ordre de saisie-arrêt avant jugement, excepté lorsqu'il y aura *preuve légale sous serment* (texte français) et *due proof on oath* (texte anglais), *à la satisfaction d'un des juges de la cour qui donnera tel ordre* (texte français) et *to the satisfaction of one of the judges issuing the same* (texte anglais), de certains faits énoncés dans la dite section Les mots "preuve légale" qui doivent signifier quelque chose ne se trouvent pas dans la partie ci-dessus citée l'Ordonnance de 1785, qui a rapport au *capias*. L'affidavit d'une seule personne, aurait-il dû suffire pour établir cette preuve légale ? Remarquons que, d'après les dispositions de l'Ordonnance de 1785, l'affidavit du Demandeur seul, attestant les faits requis, suffit pour justifier l'émanation d'un *capias*, car ces dispositions le disent en termes exprès. Il n'y a rien de la sorte dans l'Ordonnance de 1787, relative à la saisie-arrêt avant jugement. Elle ne dit pas par qui, ni par quel nombre de personnes, sera faite sous serment, la *preuve légale* qu'elle exige. N'est-ce pas nous laisser sous l'empire du droit commun, qui requérait deux témoins pour la preuve de certains faits, tel que celui de la *fraude* ? En effet, cette *preuve légale* doit mon-

trer que le Défendeur est sur le point de recéler ses biens, dettes et effets, ou qu'il est dans l'intention de se cacher, ou de quitter la province, *dans la vue de frauder ses créanciers.* La saisie-arrêt n'est pas, que je sache, un élément du droit anglais, du moins telle que nous la connaissons et pratiquons dans le Bas-Canada. Elle est essentiellement de droit français, sauf quelques règlements particuliers que nos lois statutaires ont pu faire sur la matière. Du reste, l'Ordonnance de 1787 le reconnaît elle-même, par la manière dont elle s'exprime dans la 10e section, " excepté dans le cas de dernier équipeur, *suivant l'usage du pays.*" Le *capias ad respondendum* et la saisie-arrêt avant jugement, sont des procédures d'une extrême rigueur. L'un prive de la liberté, l'autre peut causer une ruine complète. Les lois qui permettent d'y avoir recours, doivent donc être interprétées strictement. Ne perdant pas de vue la différence du langage du législateur dans ces deux ordonnances de 1785 et 1787, je suis porté à dire que l'on n'aurait pas dû, quant à la saisie-arrêt, augmenter de ce qui se pratiquait quant au *capias.* Je sais que, par le passé, on s'est contenté de l'affidavit ou serment d'une seule personne, même de celui du Demandeur lui-même. J'avoue qu'il serait difficile de revenir contre cette pratique, surtout si la question s'est déjà présentée, ce que j'ignore. Mais si elle ne s'est jamais présentée comme elle l'est aujourd'hui, peut-être trouverons-nous à propos de renoncer à suivre, en fait de procédure, une pratique qui, évidemment, est contraire à la loi, si l'interprétation que je donne à cette loi est exacte, et si la nouvelle législation, subséquente à l'introduction de cette poursuite, n'a apporté aucun changement. Admettant, pour un moment, que le simple affidavit d'une seule personne, même celui du Demandeur, doive suffire pour permettre l'émanation d'un bref de saisie-arrêt avant jugement, toujours est-il que c'est une procédure qui, jusque-là, est *exparte,* que l'Ordonnance que le juge accorde, est ainsi accordée sur *requête non communiquée ;* et contre une pareille ordonnance, il était permis de se pourvoir par simple requête afin d'opposition sous l'autorité de l'Ordonnance de 1667, titre XXXV, art. 2. Dans son Commentaire sur cet article, RODIER se demande : " Qu'est-ce qu'un arrêt donné sur requête ? " " C'est " dit-il, " une ordonnance ou un arrêt rendu sur la requête d'une partie non-communiquée ou signifiée à l'autre ; ou un arrêt rendu sur requête de *soit montré* au procureur-général sans que l'autre partie en ait eu communication ; de sorte que c'est comme si celui-ci n'eût pas été partie." Puis, il ajoute : " Si cet arrêt est émané de la même cour où on le produit, on peut l'attaquer par la voie simple de l'opposition en la même cour," c'est-à-dire, " par simple requête, pour faire connaître que c'est une exception à l'article

1er du dit titre XXXV." La *preuve légale*, exigée par l'Ordonnance de 1787, de quelque manière qu'elle soit faite, ne sera tout au plus qu'une preuve *prima facie* des faits qu'elle affirme. Cette preuve, il doit être permis à la partie Défenderesse, du moins lorsqu'après coup elle lui est communiquée, de la détruire, si elle le peut. L'ordonnance de 1667 lui en donnait le droit, et je ne vois nulle part que nos lois statutaires le lui aient ôté. Si ce droit subsiste encore, il me semble que, dans notre système de procédure, un Défendeur l'exerce régulièrement par une exception à la forme. Cela équivaut, à toutes fins, à la simple requête du droit français, puisqu'il ne la présente que lorsqu'il est appelé à répondre à la demande formulée contre lui, réponse qu'un Défendeur ne peut faire que par le moyen d'exceptions ou de défenses. L'affidavit est une formalité nécessaire à l'émanation de la saisie-arrêt ; le Demandeur la remplit seul ; sans elle, cette saisie ne pourrait pas subsister. L'affidavit donne l'existence à l'exploit de saisie-arrêt ; si les faits qui y sont exprimés sont vrais, ils constituent la validité de l'exploit : s'il ne le sont pas, l'exploit est nul. En attaquant l'affidavit, il attaque nécessairement l'exploit. Il le fait donc régulièrement quand il le fait par une exception à la forme. (1) Il me semble que l'ordonnance de 1787 a laissé au Défendeur, dans toute sa plénitude, le remède qu'il invoque aujourd'hui d'abord parce qu'elle a gardé le silence à cet égard, ensuite parce que le législateur ayant plus tard, comme je le ferai voir bientôt, donné un remède semblable dans le cas de *capias ad respondendum*, il l'a fait sans rien dire de la saisie-arrêt, quoiqu'il y eût pour elle la même raison de le faire, si le remède n'eût pas déjà existé pour le saisi. Le statut de 1849, ch. 42, tout en ayant pour objet d'abolir l'emprisonnement pour dette, ainsi que son titre et le préambule l'annoncent, a néanmoins ajouté aux cas où cet emprisonnement peut avoir lieu ; c'est lorsque l'affidavit constate que " le Défendeur a caché ou est sur le point de cacher ses biens et effets, avec l'intention de frauder ses créanciers en général, ou le Demandeur en particulier." (sect. 2) L'on voit que ce dernier cas était celui où, ci-devant, il était permis de procéder par voie de saisie-arrêt avant jugement, et non par voie de *capias*. Mais le statut de 1849, en donnant la voie du *capias* dans ce dernier cas, ajoute, tant pour ce cas que pour les autres, " qu'il sera loisible à la cour ou à tout juge de la cour d'où aura émané l'ordre d'arrêter toute personne, soit en terme ou en vacance, d'ordonner que cette personne soit remise en liberté, s'il lui est démontré par une requête sommaire et des preuves satisfaisantes, que le Défendeur n'a pas caché et n'était pas sur le point de cacher ses biens et

(1) Pothier, *Proc. Civile*, p. 15.

effets avec l'intention frauduleuse, lorsque ce motif aura été assigné à l'arrestation." (Même section). Cette disposition est reproduite dans les Statuts Refondus du Bas Canada, ch. 87, secs. 1 et 8. Ainsi, lorsqu'un débiteur sera arrêté sous l'autorité d'un *capias*, même dans le cas de recel de ses effets avec intention frauduleuse, il aura le droit, en démontrant à un juge, sur requête sommaire, que la cause assignée est fausse, d'obtenir sa liberté; et le saisi, dans le même cas, n'aura pas le même remède! C'est ce que je ne puis concevoir. Non, je crois qu'il vaut mieux dire que si la loi de 1849 n'a pas donné ce remède au saisi, c'est qu'il existait déjà pour lui. Je remarquerai, au moment de finir, que Roger, dans son traité de la saisie-arrêt, No 149, vient à l'appui des prétentions des Appelants, et il cite Pigeau, t. 2, p. 157. Quand on songe qu'à présent, non seulement le juge et le greffier ont le pouvoir d'ordonner l'émanation d'un *capias* ou d'un bref de saisie-arrêt, mais encore qu'un simple commissaire nommé pour recevoir des affidavits peut également l'ordonner, nous avons un motif additionnel de donner à la loi que l'Appelant invoque, une bien stricte interprétation. La cour rendit à l'unanimité le jugement suivant: " 1° Considérant qu'en cette instance il a été émané, sur l'affidavit ou serment de William Sache, une saisie-arrêt avant jugement; que l'affidavit est, en pareil cas, une formalité nécessaire pour l'émanation de la saisie-arrêt, qui ne pourrait pas subsister sans cela; que l'affidavit donne, par conséquent, l'existence à l'exploit de saisie-arrêt; que la validité ou invalidité de cet exploit dépend de la vérité ou de la fausseté des faits qui y sont énoncés; (supposant toujours, que, d'après la manière dont ils sont exposés, ils soient suffisants en loi) qu'en attaquant l'affidavit, la partie saisie attaque nécessairement le dit exploit; que cela peut se faire régulièrement par une exception à la forme; 2° considérant que, par leur exception à la forme à la saisie-arrêt, les Défendeurs, Appelants, ont attaqué l'affidavit, et, par la dénégation des faits y énoncés, ont lié contestation avec la Demanderesse sur la validité de la dite saisie-arrêt; 3° considérant que, par sa *réponse en droit* à l'exception, la Demanderesse, Intimée, a mis en question la validité de l'exception; mais que la réponse est mal fondée; 4° considérant qu'il aurait dû être ordonné par la cour de première instance, qu'avant faire droit, il fût procédé à la preuve sur la contestation liée par l'exception à la forme, et par suite d'icelle; 5° considérant que, partant, il y a eu mal jugé dans le jugement dont est appel, en ce qu'il maintient la réponse en droit à l'exception à la forme, et déboute les Défendeurs de l'exception. Infirme le jugement rendu le 31 mai 1860, par la Cour Supérieure, siégeant à Montréal; et cette cour, procédant à rendre le jugement que la Cour Supérieure aurait

dû rendre, déboute la Demanderesse de sa réponse en droit à l'exception à la forme, déclare que la dite exception à la forme procédait valablement, et ordonne, qu'avant faire droit, enquête soit faite sur la contestation liée entre les parties par l'exception à la forme, et par suite d'icelle, et ce suivant la loi et la pratique de la Cour Supérieure. (12 *D. T. B. C.*, p. 265 et 8 *J.*, p. 1.)

DORION, DORION et SÉNÉCAL, pour les Appelants.

LAFLAMME, LAFLAMME et DALY, pour l'Intimée.

CAPIAS CONTRE UN MINEUR COMMERCANT.

COUR SUPÉRIEURE, Montréal, 26 avril 1862.

Présent : SMITH, Juge.

BROWNING, Demandeur, *vs.* YULE, Défendeur, *et* WALES, tuteur, Intervenant.

Jugé : Qu'un mineur faisant commerce peut légalement s'obliger pour sa pension et nourriture, et être assujetti, en ce cas, à l'arrestation par *capias ad respondendum.* (1)

Action pour pension et arrestation du Défendeur, par voie de *capias ad respondendum.* Le Défendeur était arrivé de New-York à Montréal, en avril 1854, et s'était logé à l'hôtel du Demandeur auquel il devait £42 de pension, et lui avait donné une traite sur un nommé Maitland, que ce dernier avait refusé d'accepter. Le Défendeur plaida minorité, et fit intervenir son tuteur qui demanda le débouté de cette action contre son pupille. Le Demandeur répondit que, lors de l'institution de l'action, il y avait déjà trois ans que le Défendeur, au su et avec le consentement de son tuteur, avait laissé son domicile à Argenteuil, pour aller s'établir à New-York où il avait depuis transigé des affaires pour son propre compte, et comme l'agent d'une manufacture de plumes d'or, recevant une commission sur la vente de ces effets ; que c'était en cette qualité et pour les faits de son commerce qu'il était venu à Montréal et s'était endetté envers lui ; qu'il ne savait pas que le Défendeur fût mineur, et que, d'ailleurs, ce dernier avait au-dessus de vingt ans révolus lorsqu'il avait contracté cette dette, enfin, que Yule n'avait pas fait dans son hôtel de dépenses au-dessus de son rang et de sa position. A l'enquête, il fut établi que le Défendeur s'était toujours donné depuis son arrivée à Montréal, comme l'agent d'une manufacture de plumes d'or à New-York, et qu'il avait exposé de ces effets en vente dans sa chambre.

(1) V. art. 1005 C. C. et 796 C. P. C.

SMITH, juge : L'exposition d'effets en vente par le Défendeur est suffisante pour lui donner qualité de commerçant, et pour faire renvoyer, par conséquent, son plaidoyer de minorité.

" The Court : Doth dismiss the plea of minority pleaded by Defendant, inasmuch as he, Defendant, was a trader at the time he contracted the debt for the recovery of which this action was brought, and that he, Defendant, contracted the debt in the course of his business, and doth adjudge and condemn Defendant to pay to Plaintiff the sum of £30 0 0 for board and lodging furnished, &c. And the court doth dismiss the intervention made and filed in this cause, &c. (12 *D. T. B. C.*, p. 292.)

ABBOTT, pour le Demandeur.

ROBERTSON A. et W., pour le Défendeur et l'Intervenant.

ABORDAGE.—DOMMAGE.

SUPERIOR COURT, Montréal, 28 Février, 1862.

Before : BADGLEY, Justice.

BERTRAND *vs.* DICKINSON.

Jugé : Que si, dans le cas d'un abordage entre deux vaisseaux dans un canal, le vaisseau du Demandeur était du mauvais côté du canal, et n'avait pas la lumière ordinaire, il ne lui sera accordé aucuns dommages, quand même il existerait du doute quand à la cause de la collision.

2° Que, dans l'espèce, il y avait preuve de négligence de la part du Demandeur. (1)

BADGLEY, Justice : This is an action by the proprietor of a barge, claiming $568 damages, against Defendant, the owner of a steamer, such damages arising from a collision between the vessels in the Lachine Canal. As is usual in cases of this kind, there is a good deal of contradictory evidence. But certain facts appear which must throw the loss on Plaintiff. He was on the wrong side of the canal, and did not show the lights which are usually carried. The rules of the canal as to lights are not legally proved ; it appears, however, that the canal was of very considerable width at the place where the collision took place, near the Wellington Street Bridge, and that the barge was not in its proper track. The Defendant's vessel had the usual lights, and, under these circumstances, the action must be dismissed.

JUDGMENT : " Considering that the collision, of the results whereof Plaintiff hath complained, was occasioned by his own

(1) V. art. 1053 C. C.

negligence: Considering that, at the time of the collision, the vessel of Plaintiff was coming down the canal towards the harbour of this city, and was on the wrong side of the canal for such course: And, considering that, at the time of the collision, the vessel of Plaintiff was not lighted in the manner usual and as practised and observed by vessels navigating the canal, doth dismiss Plaintiff's action. (12 *D. T. B. C.*, p. 304.)

DENIS and DESNOYERS, for Plaintiff.

ABBOTT and DORMAN, for Defendant.

POURSUITE PAR UNE CORPORATION MUNICIPALE.—DEPENS.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 12 juin, 1862.

Before: Sir L. H. LAFONTAINE, Bart., Chief-Justice, MEREDITH, MONDELET, and BADGLEY, Justices.

LEMESURIER, Appellant, *and* THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF CHESTER WEST, Respondent.

Jugé: 1° Qu'une action portée par l'ordre d'un Conseil Municipal doit être intentée, non au nom de ce conseil, mais bien au nom de la corporation que ce conseil représente. (1)

2° Que, dans l'e-pèce, l'action étant portée par un corps qui n'avait aucune existence légale, et les membres de ce corps n'étant pas nommés dans la procédure, il ne pouvait être accordé de dépens à l'Appellant sur infirmation du jugement dont était appel. (2)

On the 28th December, 1859, Respondents, by the name of the "Conseil Municipal du Township de Chester Ouest," instituted an action against Appellant for the sum of £60 11s. 0d., alleged to have been paid by them to certain persons employed by the *sous-voyer* of the locality to perform certain road work, for which it was pretended that Defendant was liable as proprietor of certain lots of land in the township of Chester. The evidence on the part of Respondents, which connected Appellant with the lots of land in question in the cause, was contained in the affidavit of one Frechette, a *sous-voyer*, who stated: "Que les formalités de la loi ont été observées et suivies, et que les travaux ont été accomplis, et les matériaux fournis; que la somme demandée par l'action en est la valeur véritable, et que le Défendeur est la personne qui est tenue de la payer suivant la loi, tel que porté en l'action; de plus, que le déposant est le sous-voyer pour la division de Chester Ouest, dans les limites duquel le Défendeur possède

(1) V. art. 3 et 4 C. M.

(2) V. art. 478 C. P. C.

et occupe les lots de terre décrits en l'action." This affidavit was made under the provisions of the 18 Vic., cap. 100, sec. 60, with this affidavit certain documentary evidence was filed. The Appellant examined a witness, Zoël Beliveau, who said: "I am acquainted with the two lots of land named in Plaintiff's declaration, namely, lot number thirteen, in the Craig's road range north, in the township of Chester, and lot number fourteen, described in the said declaration as "le lot No. 14 sud, dans le dit township." It is to my knowledge that Defendant has never lived upon either of the lots, they were wild lots, and unsettled; and I have no knowledge as to who is or was the proprietor of the lots." The Appellant also produced documentary evidence to establish that the lots in question belonged to the representatives of the Hon. John Stewart. On this evidence the cause was heard before Monk, Justice, and, on the 16th November, 1861, the following judgment was rendered: "The Court &c., considering that Plaintiffs have proved, by legal and sufficient evidence, the material allegations of their declaration, doth maintain the action, and doth condemn Defendant to pay Plaintiffs the sum of sixty pounds and eleven shillings, with interest, &c."

IRVINE, for Appellant: The action should have been brought by the municipality of Chester West, and not by the Municipal Council. The law (1) incorporates the inhabitants of every parish and township under the name of: "The corporation of the parish or township of——— ;" (*inserting the name of the proper parish or township.*) The affairs of the corporation are managed by a municipal council, but they can only sue in the corporate name, and have no power to sue or be sued in their own name. It follows that the action has been brought by a body having no corporate existence, and has not been brought by the municipal corporation of the township, in which alone the right of action existed. The 6th section provides that the action shall be brought by the municipality, and the 7th section interprets municipality, to mean: "Any territory incorporated under this Act." It is clear then that, for this reason, alone the action should have been dismissed. The action, even if brought by the corporation, could not be maintained on the evidence adduced. The law permits the affidavit of the overseer sworn before a Justice of the Peace, and accompanied by a certificate of the inspector, to be *prima facie* evidence, when not controverted. But, in this case, it is controverted by the strongest evidence which it is possible to produce, for, it is impossible to prove that a given individual is not the proprietor of a particular lot of wild land otherwise than by

(1) 18 Vic., cap. 100, sec. 10.

proving that he is not in possession, and that the title is in another person. It is evident then that Defendant has been condemned on insufficient testimony. It is also worthy of remark that the lots of land in question are described in the declaration as Nos. 13 and 14, without mentioning the ranges in which they are situated, and that they are not identified as the same lots as those mentioned in the procès-verbal of the *grand-voyer* as being liable for the road work in question.

TALBOT, for Respondent: L'objection de l'Appelant qui va à dire que l'Intimé n'a pas poursuivi suivant la dénomination de la loi, n'est pas fondée; pour s'en convaincre, il suffit de référer à la 22 Vict., chap. 39, qui divise le township de Chester en deux municipalités; de plus, la section 60 de la 18 Vict., chap. 100, dit expressément: "*la demande de la municipalité*;" ici, c'est la municipalité qui porte l'action, donc elle est bien portée; l'inspecteur avait aussi le droit d'action; la sec. 80 du dit acte, dit: " nulle objection à la forme " ou fondée seulement sur l'omission de certaines formalités, " ne sera admise dans une action, poursuite ou procédure sui- " vant cet acte, à moins que quelque INJUSTICE RÉELLE ne dût " résulter du refus d'admettre cette objection." Or, ici, nul doute qu'il y aurait injustice en maintenant les objections de l'Appelant, puisqu'il est de toute évidence que l'action est juste et bien fondée; au reste, toutes les informalités, si aucune il y a, ont été couvertes par la plaidoirie au mérite; de plus, elles devaient être plaidées spécialement. L'Appelant n'a aucunement réfuté la preuve de l'Intimé, quoiqu'il ait produit le testament de l'Honorable John Stewart, et rien ne constate que les lots de terre dont il s'agit, fassent partie des biens de sa succession, si toutefois elle est ouverte, car son décès n'est pas prouvé, de plus, le certificat des lettres patentes produites ne prouve rien non plus en faveur de l'Appelant, et ce dernier n'a prouvé aucun fait à l'encontre des prétentions de l'Intimé.

MEREDITH, Justice: The action in the Court below was brought for the recovery of a sum of £60 11 0, alleged to have been expended by Plaintiffs for certain road work, which they contended ought to have been done by Defendant, as the owner of certain lands in the township of Chester West. Under the 18th Vict. cap. 100, sec. 10, (that being the law by which the present action is to be determined) the township of Chester West, became a corporation under the name of " the corporation of the township of Chester West," and plainly it is in that name, as the corporate name of the municipality, that the action in the Court below ought to have been brought. The council of each municipal corporation has power, within certain limits, to transact the affairs

of the corporation; but debts, due to a municipal corporation, must be recovered, not in the name of the council of the corporation, but in the name of the corporation itself: The objection taken on this ground by Appellant, is not merely an objection as to form; on the contrary, it amounts to this that the proceedings in the Court below have been instituted by a body, which, although, for some purposes known to the law, nevertheless, has not the power to sue or to be sued. And if we maintain the objection thus urged, we virtually say that, *as to the proceedings before us*, Respondent is a nonentity. Indeed the objection thus urged seems to me to go farther than Appellant would probably wish. "The Municipal Council of the township of Chester West" (the Respondent) is not a corporation; and the persons who compose that council, are not parties to these proceedings; now, if we have not before us as party Respondent, either a corporation or the persons composing the council; against whom could a judgment for costs in favour of Appellant be enforced? As to the merits, it seems to me that Appellant ought not to have been condemned. The Respondents produced, in support of their demand, an affidavit of Joseph Fréchette, *sous-voyer*, which, under the Statute, it is declared, "shall be *primâ facie* evidence of "such facts, and, if not controverted, shall be sufficient to "maintain the claim and demand of the Municipality or of "such overseer." (18 Vict., cap. 100, sec. 60.) The Appellant proved that the lands on account of which he was sued are wild and unsettled; and has produced legal evidence establishing, that in the year 1830, the lands in question were granted by the crown to the late John Stewart; and Appellant has also produced the last will and testament of John Stewart, appointing his four children his residuary legatees and appointing executors, of whom Appellant is one. The Appellant has therefore, as he contends, proved that he is not the proprietor of the lands in dispute, by shewing, as far as it is possible to do, in the case of wild lands, that he is not in possession of them, and that the title to the lands must be presumed to be in the Hon. John Stewart, or his representatives, if he be dead. The proof thus adduced by Appellant seems to me to have been sufficient, at least to controvert the affidavit of the road surveyor produced by Respondents, and to compel them to support their demand by evidence in the ordinary course of law. The secretary treasurer of the municipality of the township of Chester West, in his deposition as a witness for Appellant, explains the grounds upon which the road dues in question were charged against Appellant. That witness says: "My reason for supposing that LeMesurier was proprietor of the said lots, and for charging him with the

taxes mentioned in the Plaintiff's declaration was, that Adolphus Stein, of Arthabaska, paid me some taxes upon the said lots, and at the said time stated that he was paying these taxes for LeMesurier, but did not state what LeMesurier it was; it was upon this information that the charges were made against LeMesurier." Taking this evidence in connexion with the provision of Stewart's will, appointing Appellant one of the executors of that will, it may reasonably be presumed that the taxes spoken of by the secretary-treasurer, were paid by Appellant as one of the executors of the last will and testament of Stewart, or as the husband of one of the legatees named in this will; and, if Appellant, in his plea in the Court below, had, as our law requires, stated, *bonâ fide*, "the real facts" upon which he intended to rely, it seems to me very improbable that an appeal to this Court would have been necessary. This consideration would be deserving of attention as to the question of costs, if we were of opinion that there is a party Respondent, against whom a condemnation for costs could be rendered, but, as we are all of opinion that there is no such party before the Court, that of itself renders it impossible for us to adjudicate as to costs. As I have already said we cannot condemn the corporation, as we agree with Appellant in saying that there is no corporation before us, and, we cannot condemn the members of the council individually, firstly, because they are not named in the proceedings, and, secondly, if indeed a second reason may be necessary, because there are no conclusions against the members of the council.

"The Court Considering that the Municipal Council of the township of Chester West is not a corporation, and has not power to sue or be sued, and, therefore, that, in the judgment of the Court below maintaining the action brought by the municipal council, there is error, doth, in consequence, reverse the judgment rendered by the Superior Court sitting at St. Christophe d'Arthabaska, on the sixteenth day of November, 1861, and, proceeding to render the judgment which the Court below ought to have rendered in the premises, doth dismiss the action and demand of the Municipal Council of the township of Chester West, etc. (12 *D. T. B. C.*, p. 314.)

HOLT and IRVINE, for Appellant.

TALBOT, for Respondent.

INJURES A UN PILOTE.

SUPERIOR COURT, Montreal, 26 avril 1862.

Before SMITH, Justice.

MORISSETTE, *vs.* JODOIN.

Jugé : Que l'avancé du propriétaire d'un vaisseau que le pilote avait été payé pour le jeter à la côte et le détruire, est une injure grave, et de nature à faire tort au Demandeur.

SMITH, Justice : Plaintiff, who is a pilot, has sued Defendant in damages for having stated, on more than one occasion, that Plaintiff, had been paid by the Richelieu company to run Defendant's vessel aground and to destroy her. The Plaintiff was the pilot on board *L'aigle*, plying between Montreal and Laprairie, and such a statement is a serious one coming from the owner, and likely to do damage to the Plaintiff in his business, and is highly slanderous. Judgment will be for £50 and costs. (12 *D. T. B. C.*, p. 333.)

LANCTOT, for Plaintiff.

CARTIER and POMINVILLE, for Defendant.

HONORAIRES DU PROTONOTAIRE.

COUR SUPÉRIEURE, Québec, 1er octobre 1861.

Présent, TASCHEREAU, juge.

PLAMONDON, *et al.*, *vs.* SAUVAGEAU.

Jugé : Que le protonotaire n'a pas le droit d'exiger le paiement de ses honoraires avant de rendre les services pour lesquels ces honoraires sont dus.

Le 1er octobre 1861, le Demandeur fit motion que le protonotaire fût obligé de lui préparer un writ de *venditioni exponas*, ce qu'il avait refusé de faire avant que le coût de tel writ ne fût payé.

DÉCHÈNE, pour les Demandeurs : Le 13 de septembre le procureur des Demandeurs présenta un *præcipe* au protonotaire, le requérant de préparer un writ de *venditioni exponas ;* il lui fut répondu que le *præcipe* ne serait pas reçu, ni le writ préparé, à moins que le protonotaire ne fût payé sur la présentation du *præcipe ;* que, par le nouveau tarif du mois de mars 1861, il était dit que l'honoraire serait payable quand le protonotaire serait requis de faire quelque service pour lequel un honoraire était exigible. Le procureur des Demandeurs refusa de se soumettre à ceci, sur le principe que les quelques lignes du tarif, où il était dit que : " Les honoraires dans tous

" les tarifs ci-dessus seront dans tous les cas exigibles au temps " où l'officier est requis de remplir le devoir pour lequel l'ho- " noraire est exigible, (excepté lorsqu'il y est autrement pour- " vu)," ne comportent pas que le barreau ou les plaideurs sont obligés de payer *avant* le service rendu ; dans le cas soumis le service requis du protonotaire est de livrer aux Demandeurs un writ de *venditioni exponas*, du moment que le protonotaire sera prêt à livrer ce writ, il aura droit de recevoir l'honoraire fixé. Maintenant, en supposant que le paragraphe cité plus haut, voulût dire que le protonotaire aurait le droit de se faire payer d'avance, il est indubitable que le gouverneur en conseil, dans ce cas, aurait excédé les pouvoirs qui lui sont conférés par la loi, (1) et cette disposition du tarif serait simplement nulle par excès de juridiction, car il ne se rencontre pas un mot dans le statut cité qui donne à l'exécutif le pouvoir de faire telle provision.

CASAULT, pour le protonotaire, répondit : Que cette motion ne pouvait être accordée, parceque le protonotaire était strictement en droit d'exiger d'avance le paiement de l'honoraire d'office en question ; que le tarif de 1861 lui donnait ce pouvoir en ces mots : " The fees in all the above tariffs to be payable " in all cases (excepting where otherwise provided for) when " the officer is required to perform the service for which the " fee is chargeable ; " que ce tarif était maintenant en usage, et que les plaideurs et leurs procureurs devaient s'y soumettre.

JUGEMENT : Motion accordée. (12 *D. T. B. C.*, p. 333.)

DÉCHÈNE, pour le Demandeur.

CASAULT et LANGLOIS, pour le protonotaire.

ASSURANCE.

COUR SUPÉRIEURE, Montréal, 30 décembre 1861.

Présent : SMITH, Juge.

GILMOUR et al., Demandeurs, *vs.* DYDE et al. Défendeurs.

Jugé : Que dans le cas d'une assurance en bloc sur des quantités indéterminées d'alcalis appartenant à plusieurs individus, endommagés par inondation et subséquemment détruites par incendie, chacun des intéressés doit contribuer dans la réduction faite sur le montant de l'assurance à raison de la perte causée par l'eau, en autant qu'il n'y avait aucun moyen de constater à qui appartenaient les alcalis endommagés par l'eau.

Les Demandeurs allèguent ce qui suit : Le 13 avril 1861, les Défendeurs, inspecteurs de potasse et de perlasse pour la

(1) Statuts refondus, chap. 93, secs. 18 et seq.

cité de Montréal, ont reçu des Demandeurs, pour inspection, et emmagasiné dans leurs voûte, 49 quarts de perlasse et 230 quarts de potasse, le tout d'une valeur de $8,412.22. Le 26 du même mois, ils ont demandé leurs 49 quarts de perlasse et leurs 230 quarts de potasse. Mais les Défendeurs leur ont répondu qu'ils avaient été détruits par le feu. Le 8 juin dernier les Demandeurs ont sommé, par le ministère d'un notaire, les Défendeurs de leur livrer leurs effets, ou leur valeur actuelle sur le marché, moins leurs émoluments pour emmagasinage et inspection. Les Défendeurs leur en ont offert la valeur moins leurs émoluments etune déduction de 4/2½ par quart. Ils ont accepté somme offerte sous protêt, et, maintenant, ils demandent à la être remboursés de la somme de $234.82, montant auquel s'est élevée cette déduction de 4/2½ par quart, faite illégalement et sans aucun droit. Les Défendeurs plaident : que le 14 avril 1861, ils avaient en leur (qualité susdite) dans leur voûte et appartenant à diverses personnes, 2,044 quarts de potasse et 1226 quarts de perlasse d'une valeur collective de $92,643 ; que, par la loi, ils sont obligés d'assurer la potasse et la perlasse emmagasinées dans leur voûte pour une somme de $100,000, ce qu'ils ont toujours fait, et, notamment que le 14 et le 15 avril 1861, il y avait une assurance au Phénix pour $28,000, une à la Royale, pour $25,000, une à l'*Unity* pour $15,000, une à la *Queen* pour $12,400, une au Manhattan pour $10,000, et une à la British America pour $9,600, formant en tout la somme de $100,000 ; que ce jour-là, (14 avril), l'eau s'est élevée à une hauteur qu'elle n'avait jamais atteint auparavant de mémoire d'homme, et qu'il s'en est suivi une inondation par laquelle la potasse et la perlasse emmagasinées dans le rez-de-chaussée de leur magasin ont été endommagées au montant de $2,756 ; que, le lendemain, leur magasin à potasse et perlasse a été consumé par le feu et tout ce qu'il contenait détruit ou endommagé, et que les assurances ont refusé de couvrir toute la perte, insistant que le dommage souffert précédemment, par suite de l'inondation, fût porté en déduction du montant de la perte, tel dommage devant être fixé par des arbitres, comme les compagnies d'assurance sont autorisées à le demander en pareil cas, et ce à quoi les Défendeurs ont consenti, comme ils y étaient tenus ; que l'eau a ainsi endommagé 350 quarts, la dernière rangée celle qui était placée immédiatement sur le plancher du rez-de-chaussée ; que les arbitres ont estimé le dommage à $8 par quart ; que toute la quantité endommagée vendue à l'encan n'a produit qu'une somme de $17,600 que les compagnies d'assurance ont mise en déduction de l'indemnité, ainsi que la somme accordée par les arbitres comme dommage causé par l'eau ; que les Défendeurs, aussitôt après avoir reçu l'indemnité ainsi réduite, ont payé aux

Demandeurs le montant de leur perte, en déduisant toutefois leur contribution au marc la livre sur le dommage causé par l'inondation, proportionnellement à la valeur totale de la quantité de potasse et perlasse emmagasinée ; les Défendeurs ne sachant pas, et ne pouvant savoir à qui appartenait la dernière rangée des quarts qui se trouvaient dans le rez-de-chaussée lors de l'inondation, ont pensé que le seul mode équitable d'ajustement était la contribution générale *(general average)* ; en effet, la grande majorité des réclamants l'a accepté comme juste et équitable, et comme le seul praticable dans la circonstance.

Tous les faits matériels de la cause ont été admis par les parties.

POPHAM, pour les Demandeurs : La question se réduit à celle-ci : Les Défendeurs peuvent-ils, dans le cas actuel, invoquer le principe de la contribution générale *(general average)* pour couvrir la perte par l'eau ? La contribution générale *(general average)* a été définie par les cours en Angleterre : toute perte qui résulte de sacrifices ou dépenses extraordinaires faits en sauvant le vaisseau ou la cargaison. La loi française, après avoir énuméré les différents cas où la contribution générale a lieu, finit par déclarer contribution générale, la perte soufferte volontairement, et les dépenses faites après délibération motivée, dans l'intérêt et pour la conservation du vaisseau et de la cargaison, depuis la date du chargement et du départ jusqu'à la date de l'arrivée à destination et du déchargement. (1) L'extrait qui suit fait voir que deux éléments sont requis pour qu'il y ait lieu à l'application de la règle de la contribution générale. 1° Le cas d'un *vaisseau* et d'une *cargaison* ; 2° Une perte volontaire, subie après délibération dans l'intérêt du salut du navire et de la conservation de la cargaison. Dans le cas actuel, la perte par l'eau, n'a été " ni volontaire ni soufferte *après délibération motivée." Elle n'a pas été davantage encourue pour la conservation du reste des cendres de la voûte, puisque l'inondation a eu lieu une journée avant l'incendie.* Maintenant, pour répondre à cette objection des Défendeurs qu'il leur était impossible de savoir à qui appartenaient les alcalis endommagés par l'eau le jour qui a précédé l'incendie : 1° Il est en preuve que chaque quart était marqué de certaines lettres ou initiales. Le sens commun nous dit donc qu'il aurait été facile de reconnaître ceux qui avaient souffert par l'inondation, si l'on avait pris la précaution si simple et pourtant nécessaire de tenir un livre indiquant la place occupée par chaque lot et les marques ou initiales. Les Défendeurs assurent que l'inondation n'a endommagé que la première rangée, celle

(1) Stevens and Beneck, *on average*, 96, Boston Ed. 1833.

qui était placée sur le plancher même du rez-de-chaussé. Il s'ensuit que si l'on eût tenu un livre semblable, on aurait pu voir à qui appartenaient les quarts qui formaient la 1ère rangée du rez-de-chaussée, en comparant les entrées du livre avec les certificats de dépôt, *Ashes Bills*, de chacun des réclamants, au fur et à mesure qu'ils se sont présentés pour paiement après le feu ; 2° D'ailleurs, que nous apprend le témoignage de Frederick W. Henshaw, qui a été pendant 15 ans employé dans les magasins d'inspection de cette ville ? Il déclare que, pendant tout le temps qu'il a été là, le contre-maître a toujours tenu, comme c'est son devoir de le faire, un livre indiquant les initiales marquées sur les quarts, leurs poids respectifs, la qualité et les prix d'inspection, de tonnellerie et d'emmagasinage. Ce témoignage est corroboré par le fait que les Défendeurs ont examiné Joseph Morin, leur contre-maître, après que Henshaw eût fait sa déposition, et qu'ils ont cependant soigneusement évité de l'interroger sur un point aussi important, preuve qu'ils n'espéraient pas pouvoir contredire ce témoignage ; 3o. Nous avons l'admission de Dyde lui-même. Trois témoins rapportent qu'ils l'ont entendu déclarer, dans une assemblée des propriétaires des alcalis détruits par le feu, que " la plupart des quarts placés au rez-de-chaussée appartenaient à Holton." En outre, les Appelants soumettent que les Défendeurs ne sont pas seulement des inspecteurs, mais qu'ils sont aussi des *garde-magasins*, (*warehousemen*) et qu'en cette qualité ils ont reçu, à part du prix de l'inspection, celui de l'emmagasinage des quarts. Ils sont *bailees for hire*, et comme tels responsables de la plus légère négligence. Les Défendeurs n'ont pas à se plaindre d'une rigueur indue, s'ils avaient pris la plus légère précaution, la perte aurait été supportée en entier par le propriétaire des quarts ainsi détruits. Ce propriétaire, ils devraient pouvoir le désigner, c'est de leur faute s'ils ne sont pas en état de le faire, et la loi et l'équité défendent de faire souffrir un innocent par suite de la négligence d'un autre.

STUART, pour les Défendeurs : La seule matière en contestation est de savoir si la perte doit être supportée par les Demandeurs et les autres propriétaires des quarts de potasse et perlasse détruits, en proportion de leurs intérêts respectifs, ou bien par les inspecteurs, les Défendeurs. Les Demandeurs s'appuient beaucoup sur ce que les inspecteurs devaient connaître à qui appartenaient les quarts qui formaient la première rangée du rez-de-chaussée, et prétendent que ce sont ces derniers seulement qui devraient souffrir la perte. Il est à remarquer cependant que les Défendeurs ne sont pas accusés de négligence dans la déclaration des Demandeurs, et que, quand bien même ils le seraient, il n'y a pas de preuve pour appuyer

cette accusation. La perte par l'inondation doit être mise sur le compte d'un malheureux accident qui a été suivi par la destruction de la bâtisse par le feu, destruction qui a empêché les Défendeurs de pouvoir reconnaître à qui appartenait la rangée la plus basse des quarts placées dans le rez-de-chaussée. Si tous les quarts emmagasinés avaient été également endommagés par l'eau, les Demandeurs n'auraient pas demandé une indemnité des Défendeurs, ce qui prouve bien que le dommage causé par l'eau ne peut être imputé à négligence. Il y avait dans le rez-de-chaussée, lors de l'incendie, mille quarts et plus, formant trois rangées de haut dont chacune contenait 350 quarts, le rez-de-chaussée renfermant ainsi près d'un tiers de toute la quantité des quarts emmagasinés. Comme il en arrivait et qu'on en renvoyait journellement, il était impossible d'identifier les quarts formant la plus basse rangée, à moins d'un examen de tous les jours et d'entrées correspondantes dans les livres, travail fatiguant et inutile quant au but poursuivi. On a cherché à faire voir, par le témoignage de Henshaw, que, dans le temps qu'il était dans l'emploi des inspecteurs, le contre-maître tenait un livre où se trouvait marquée la place occupée par les différents lots. Mais ce livre n'a été tenu que pour rendre plus facile au contre-maître le choix des différents lots lorsque la livraison en était requise. On n'a jamais pensé à en faire une mesure de protection pour les propriétaires. Quant à l'admission prétendue de Dyde que la plupart des quarts du rez-de-chaussée appartenaient à Holton, elle se réduisait à ceci d'après le témoignage de Taylor lui-même, auquel elle aurait été faite suivant Macduff, savoir : que Dyde aurait dit à Taylor " qu'une bonne partie des quarts de M. Holton se trouvait dans le rez-de-chaussée." La différence n'est pas bien grande entre ces deux versions à première vue, c'es vrai. Mais, après examen, on trouvera que le lot appartenant à Holton ne comprenant pas plus de 203 quarts, il n'a pu remplir à lui seul le rez-de-chaussée. D'ailleurs, qui sait si ce lot là ne se trouvait pas à former la 2e et la 3e rangée, et aussi en sûreté contre toute perte ou contribution que les lots placés dans les 2e et 3e étages de la bâtisse ? L'opinion des Demandeurs que le mode d'ajustement connue sous le nom de contribution générale est limité aux assurances maritimes et ne peut être étendu aux assurances contre le feu, peut être ou n'être pas correcte. Mais il n'a pas d'application dans cette cause. Il n'est pas question ici de perte causée par le feu, mais bien plutôt d'une perte causée par l'eau avant l'incendie, et qui échappe par conséquennt à l'empire des règles qui gouvernent les assurances contre le feu. Les Défendeurs étaient les agents de tous les propriétaires de quarts de potasse et de perlasse, et étaient obligés d'assurer

toute la quantité emmagasinée jusqu'au montant de $100,000. Chaque propriétaire avait, par conséquent, le droit d'être placé dans une position égale de sûreté avec les autres propriétaires, et le placement accidentel d'un lot dans une partie de la bâtisse plutôt que dans l'autre, ne pouvait avoir l'effet d'accroître ou de diminuer le risque attaché à l'emmagasinage dans une voûte commune et pour le bénéfice commun. L'emmagasinage était une mesure de sûreté et d'utilité commune l'assurance doit être considérée comme effectuée en commun, de telle sorte que les Défendeurs, en recevant le montant de l'assurance, moins le dommage causé par l'eau, avaient le droit de la remettre à tous les réclamants en leur disant "divisez cela entre vous en proportion du nombre de quarts que chacun de vous avait d'emmagasiné chez nous."

SMITH, Juge : La contribution générale n'a d'application que dans les matières d'assurances maritimes. Le commandant d'un vaisseau use de sa discrétion en décidant quelle partie de sa cargaison il faut jeter à l'eau. Rien de semblable dans le cas actuel. Les Défendeurs sont des officiers publics à la garde desquels on remet certains effets dans un but établi par la loi. Une partie de ces effets est endommagée non par suite d'aucun acte de leur part, mais par force majeure. L'assurance n'étant pas responsable des dommages causés par l'inondation a déduit sur l'indemnité qu'elle avait à payer une somme équivalant à la perte causée par l'eau. C'est cette différence qu'on fait supporter aux Demandeurs proportionnellement à leur intérêt dans l'indemnité recouverte, dans l'impossibilité où l'on se trouve de ne pouvoir distinguer à qui appartenait ce qui a été endommagé par l'eau. On ne peut imputer à la négligence des inspecteurs le fait qu'ils ne peuvent faire telle distinction. Je ne vois pas comment ils pouvaient le faire, et comment il était possible d'indiquer le lieu où chaque envoi était déposé. (1) Jugement pour les Défendeurs. (12 *D. T. B. C.*, p. 337).

POPHAM, pour les Demandeurs.

STUART, pour les Défendeurs.

(1) Autorités citées par la Cour : Stevens and Benecke, *on Average*,, pp. 91 et 165 ; Ellis, *on Fire Insurance*, p 552.

LIBELLE DANS UN PLAIDOYER.

SUPERIOR COURT, Quebec, 5th May, 1862.

Before STUART, Justice.

FITZIMMONS, *vs.* BYRNE, *et ux.*

Jugé: Que l'allégation de fraude dans un plaidoyer n'est pas un libelle, et telle allégation ne pourra supporter une action pour libelle, à moins qu'il ne soit allégué que le plaidoyer dont on se plaint n'a été produit que pour couvrir le libelle, et était inutile à l'issue. (1)

The Plaintiff brought suit against Defendants, alleging that in an action brought by Defendants against him, a certain immoveable property was seized; to which seizure, Thomas Fisher produced an opposition *afin d'annuler*, setting forth that, in virtue of a deed of sale by Quinn, in his favor, he, Fisher, was the proprietor of the immoveable property seized; that the present Defendants (Plaintiffs in the said action,) contested this opposition on the ground of fraud and conspiracy on the part of the present Plaintiff, (Defendant in the said action,) and Fisher the Opposant, and pleaded that the name of Fisher was used in the deed as the pretended purchaser, for the purpose of defrauding his creditors, and that, in so doing, the present Plaintiff and Fisher conspired together for the purpose of defrauding the present Defendants; and that, on this contestation, judgment was rendered in favor of the Opposant Fisher, maintaining his opposition. For these reasons the Plaintiff, by his action, claimed damages to the amount of $2000. The Defendants pleaded, by *défense au fonds en droit*, the reasons of demurrer were as follows: 1st Because the pretended cause of action set forth in the declaration is a supposed libel alleged to be contained in a plea filed by Defendants to the opposition of Fisher; 2. because the facts alleged in the plea, and complained of as libellous, were relevant to the issue raised on the opposition of Fisher; 3. because no action for libel can be maintained, founded on the facts alleged in the declaration; 4. because the facts alleged in the declaration are insufficient in law to maintain the conclusions thereof.

R. POPE, for Plaintiff, cited the following authorities in support of his action. (2)

IRVINE, for Defendant, in reply, referred the court to: (3)

STUART, Justice: This is an action brought by Plaintiff, for

(1) V. art. 1053 C. C.

(2) Rep. Guyot, vbo *Diffamation;* Rep. Merlin, vbo *Diffamation;* Rep. Guyot, vbo *Calomniateur.*

(3) *Stackpole* vs. *Kennitt*, 4 Con. Louisiana rep. p, 27, new series p. 481.

a libel alleged to have been published by Defendants in a plea filed by them to a certain opposition. The declaration sets forth that, in a plea filed by Defendants to an opposition in the Superior Court, Defendants, charged the present Plaintiff with fraud and conspiracy. This plea Defendants were unable to substantiate, and it was accordingly dismissed. The only evidence of the libel adduced by the present Plaintiff is the plea containing the alleged libel, and the question now before the court is whether or not such a statement in a plea is actionable, and can be held to be libellous. The court is of opinion that it is not. Had Plaintiff alleged, in his declaration, that the plea complained of was used as a mere cloak to cover and contain the libellous matter, which was totally irrelevant to the issue on the contestation of the opposition, and that this plea was unnecessary and useless in the contestation, and had Plaintiff proved these necessary allegations, then he might have succeeded. But the contrary has taken place, not only has Plaintiff neglected to allege and prove that the libellous matter complained of was irrelevant to the issue, but Defendants have set forth and proved that the alleged libellous matter was not only relevant to the issue raised on the contestation of the opposition, but was in fact the only plea on which they could hope to succeed in their contestation. Under these circumstances, the court considers the action unfounded, and it is accordingly dismissed.

JUDGMENT: " Considering that the declaration in the present case shows that the alleged libellous matter complained of by Plaintiff formed part of a plea put in by Defendants to an opposition in a cause wherein they were a party; and considering that the allegations of said plea, and more particularly the part complained of, was material and pertinent, and if proved in fact was good in law; considering that Plaintiff has not adduced any evidence to show that Defendants were actuated by malice or any improper motive in putting in said plea, the court doth dismiss the present action. (12 *D. T. B. C.*, p. 390.)

R. POPE, for Plaintiff.

HOLT and IRVINE, for Defendants.

VENTE.—CLAUSE RESOLUTOIRE.

SUPERIOR COURT, Montreal, 30th November 1861.

Coram SMITH, J.

SURPRENANT *vs.* SURPRENANT et al.

Dans une action portée par le vendeur d'un immeuble contre l'acquéreur, et contre un tiers auquel la propriété avait été revendue, demandant la rescision des deux actes de vente en conséquence du non-payment de la balance du prix d'acquisition due en vertu du premier acte.

Jugé: Que l'action ne pouvait être maintenue, en autant qu'il n'y avait pas d'offre par le Demandeur de rembourser au second acquéreur certaines sommes à-compte d'une dette indiquée dans les deux actes comme due au seigneur, et aussi une certaine somme payée à-compte d'une obligation solidaire par l'acquéreur et le Demandeur, pour le payment de laquelle la propriété en question avait été hypothéquée par le premier acquéreur. (1)

This was an action brought to set aside a deed of sale of the 20th April, 1854, from Plaintiff to his nephew, Raphaël Surprenant, for non payment of £70 16 8, balance of the *prix de vente* of a lot of land in the parish of Laprairie, and also a deed of sale from the latter to Vital Potvin, the other Defendant, of the 24 August, 1858. Potvin pleaded to the action, and it appeared by the deeds that, in the one from Plaintiff, the purchaser, Raphaël Surprenant, (who made default to appear) was bound to pay £54 1s to the seigniors of Laprairie, which sum Potvin was also bound to pay by his deed, and had paid to the extent of £10 15; that, after deduction of £54, from the purchase money, there remained only due £16 16 8; that, on the 9th April, 1855, Plaintiff and his nephew had become parties to a joint and several obligation in favour of James McDonald for £28, with a mortgage on the land in question created by the other Defendant; that, on account of this mortgage, Potvin, had paid £14 5, and had a right to retain the land until security was given against the mortgage, which, with the sum payable to the seigniors, exceeded the sum due to Plaintiff; Conclusion praying *acte* of the offer to pay the balance due on getting security against the mortgage referred to. By his answer, Plaintiff alleged that the indication of payment had not been accepted by the seigniors, and that Plaintiff was still personally bound for Defendants, and had an interest to have the debt to the seignior discharged and that the payment of £14 5 made on the mortgage to McDonald, was made with the monies of Defendant, Raphaël Surprenant, who was indebted to Plaintiff in a larger sum.

SMITH, Justice: Stated that the principle of the action had been decided by the case of Pattenaude and l'Erigé dit La-

(1) V. art. 1539 C. C.

plante, in appeal from the Superior Court. (1) That according to that judgment, a vendor has a right to obtain the resolution of a deed for non payment of the price, even to the prejudice of a subsequent *bona fide* purchaser. He did not agree with the judgment, but felt bound to follow it. As to the defence of Potvin, one of Defendants, it amounted in part to this, that he had promised to pay the seignior a sum of money which his vendor was also bound to pay by his deed from Plaintiff. But, he had not paid that sum, but only a part of it, and he had also paid a sum of £14 5 to McDonald, on account of a mortgage created on the land. Now, I am disposed to

(1) L'article 176 de la Coutume de Paris qui se lit eomme suit : " Qui vend une chose mobiliaire sans jour et sans termes, espérant être payé promptement, il peut sa chose poursuivre, en quelque lieu qu'elle soit transportée, pour être payé du prix qu'il l'a vendue," n'a rapport qu'aux choses mobiliaires ; mais, en vente d'immeubles l'action en résolution, faute de paiement du prix, appartient de droit commun au vendeur, soit que la vente ait été faite à terme ou sans terme ; et, comme le droit de porter cette action n'a pas été affecté par les lois nouvelles concernant notre régime hypothécaire, il s'ensuit que le second acquéreur d'un immeuble qui a enrégistré son titre n'est pas fondé à opposer au premier vendeur qui demande la résolution de la vente par lui faite et de la revente, faute de paiement du prix de la première vente, le défaut d'enrégistrement de la première vente. Il ne faut pas confondre le privilège qu'a le vendeur pour le recouvrement du prix, avec le droit qu'il a de demander la résolution de la vente pour défaut de paiement du prix. Si le privilège a besoin d'être conservé par une inscription régulière pour n'être pas purgé il n'en est pas de même du droit de demander la résolution. La plupart des dispositions du statut des *lettres de ratification* de 1829, ch. 20 ont été empruntées à l'ordonnance du roi de France de 1771 portant création de conservateurs des hypothèques. L'une de ces dispositions était que tout créancier, pour conserver son privilège ou hypothèque, serait obligé de former opposition aux lettres de ratification. Cependant, sous l'empire de cette ordonnance, la jurisprudence du Parlement de Paris avait consacré le principe que " la délégation valait opposition," c'est-à-dire, que le créancier indiqué dans l'acte était exempt de faire opposition, quoiqu'il n'eut pas accepté la délégation. Cette jurisprudence à prévalu sous l'opération de notre loi de 1829. L'enregistrement requis par l'ordonnance de 1841, n'est qu'un autre mode offert à l'acquérenr de purger les hypothèques ; ce mode purge celles qui n'ont pas été enregistrées avant l'enrégistrement que l'acquéreur a pris de son titre, tandis que le mode des lettres de ratification purge celles pour lesquelles opposition n'a pas été faite dans le temps prescrit. Le créancier, pour conserver ses droits, doit, en temps utile, prendre enregistrement dans un cas, ou faire opposit on dans l'autre, mais cela ne peut s'appliquer qu'aux hypothèques *secrètes*, selon la première section de l'ordonnance de 1841, c'est-à-dire, aux hypot hèques dont l'existence n'a pas été déclarée à l'acquereur par l'acte d'acquisition même. Si sous l'opération de l'acte des lettres de ratification, l'on a décidé que " la délégation valait opposition," il y a la même raison d'appliquer cette règle, sous l'opération de l'ordonnance de 1841, en disant que " la délégation vaut enregistrement " pour le créancier vis-à-vis de l'acquéreur ; car, dans un cas comme dans l'autre, cet acquéreur ne peut pas se dire, quant au créancier délégataire, être acquéreur de bonne foi, selon les termes et l'esprit de l'Ordonnance, puisque l'hypothèque ne lui n'a pas été tenue *secrète*, qu'au contraire, il s'est obligé de payer ce créancier à l'acquit du vendeur. Si donc l'acquéreur ne peut pas, après l'obtention de lettres de ratification, se dispenser de payer le créancier délégataire non opposant, il y a parité de raison que ce même acquéreur ne peut pas se dispenser de payer le créancier indiqué, quoique celui-ci n'ait pas fait enregistrer son propre titre. La question ne serait susceptible

hold that Plaintiff cannot maintain his action not having offered to reimburse Potvin the sums of money so paid by him. The Plaintiff's action is rigorous, and the rigourous compliance with this necessary offer must be enforced, and the action must be dismissed.

JUDGMENT: "La Cour a débouté et déboute cette action " avec dépens." (12 *D. T. B. C.*, p. 397.)

LANCTOT, MÉDÉRIC, for Plaintiff.

LANCTOT, for Defendant Potvin.

de difficulté qu'à l'égard des autres créanciers qui auraient, en temps utile, pris inscription ou enregistrement de leurs titres, et non pas lorsque la question ne se présente qu'entre le débiteur délégué et le créancier indiqué dans son contrat. Mais, même dans ce dernier cas, si la question pouvait autrefois souffrir des doutes, ces doutes ont dû disparaître en présence de la disposition du statut de 1843, ch. 22, s. 6, "que l'enregistrement tout au long de *tout* " document, écrit, acte ou chose, sera suffisant pour conserver les droits de " toutes les parties intéressées en icelui, d'une manière aussi efficace, que s'il " eut été enregistré à la demande de ces parties, respectivement." Evidemment, cette disposition consacre en principe que la délégation devient parfaite par l'enregistrement en entier qui est fait du contrat dans lequel elle a été stipulée, soit que cet enregistrement ait été pris par le créancier indiqué, soit par un autre. Ce créancier, il est vrai, n'est pas partie active à ce contrat, puisqu'il n'y est pas intervenu, mais il n'en est pas moins pour cela partie intéressée en icelui, puisqu'on y a stipulé quelque chose en sa faveur, puisque la délégation qui y est portée à son profit a l'effet de le garantir contre la prescription. La loi de 1843 permet à ce créancier de faire lui-même enregistrer l'acte qui contient cette délégation, et cet enregistrement doit lui conserver tous ses droits ; la loi porte aussi que l'enregistrement aura le même effet pour ce créancier. quoiqu'il soit fait à la demande d'une autre personne. Ce serait donc méconnaître le sens et la portée de la disposition sus-transcrite du statut de 1843, que de refuser au premier vendeur non payé d'un immeuble le bénéfice de l'enregistrement en entier de l'acte de vente au second acquéreur qui par cet acte s'est obligé de le payer. L'enregistrement du second acte doit valoir au premier vendeur de même que s'il eût fait enregistrer son titre originaire, la première vente. Il s'ensuit que son droit de créance a été conservé vis-à-vis des sous-acquéreurs, et, par suite, son droit à l'action résolutoire, faute de paiement ; laquelle action lui appartient de droit commun, sans qu'il soit nécessaire d'en faire une stipulation expresse dans l'acte de vente : aussi, dans l'hypothèse où la formalité de l'enregistrement serait nécessaire pour conserver l'action résolutoire, l'enregistrement de la seconde vente contenant délégation au premier vendeur serait suffisant pour la conserver. L'enregistrement d'un acte comportant délégation équivaut à une acceptation de la délégation par le créancier délégué, même si cet enregistrement n'a pas été fait par lui. *Patenaude*, et *Lérigé dit Laplante et al.*, C. B. R., en appel, Montréal, 12 mars, 1857, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et CARON J., renversant le jugement de C. S. Montréal, 31 mars 1856, DAY, J., SMITH, J. et C. MONDELET, J., qui avait jugé que le premier vendeur qui donne crédit pour le paiement du prix de vente et qui ne fait pas enregistrer la première vente perd son droit de demander la résolution de la vente contre un subséquent acquéreur qui a enregistré son titre. (7 *D. T. B. C.*, p. 66.) Par l'article 1536, C. C., la loi a été changée, et, maintenant, le vendeur d'un immeuble ne peut demander la résolution de la vente, faute par l'acheteur d'en payer le prix, à moins d'une stipulation spéciale à cet effet, et, par l'article 2102 C. C., l'action résolutoire en faveur du vendeur, faute de paiement du prix, suivant l'article 1536 ne peut être exercée contre les tiers, si la stipulation n'en a pas été enregistrée.

FRAIS DU SHERIFF.—DECRET.—DISTRIBUTION.

DISTRICT D'ARTHABASKA, COUR SUPÉRIEURE, 19 Juin 1862.

Coram STUART, J.

PACAUD *vs.* DUBÉ. et les SYNDICS, &c., Opposants.

Jugé: Les frais de vente d'immeubles par le Shérif ne sont pas répartis également sur chaque immeuble, mais au *prorata* du prix de vente.

Tout opposant peut forcer un adjudicataire à déposer le prix de son adjudication, quand bien même cet opposant n'aurait aucun droit sur ces argents.

Les frais de distribution d'argent provenant de la vente d'immeubles sont payés au *prorata* des sommes pour lesquelles les immeubles ont été vendus.

Le Demandeur fit vendre, par le Shérif, sur le Défendeur, deux terres: la première pour £40, dont il se porta adjudicataire; la seconde fut adjugée à Ant. Gagnon, pour £10. Le Demandeur paya au Shérif la juste moitié des frais d'adjudication, et garda la balance par devers lui, qui lui était due, et qui devait lui être payée *avec privilège de Bailleur de fonds*. Gagnon, l'adjudicataire de l'autre terre, paya au Shérif £10, le montant de son adjudication. Les Syndics de la paroisse de Saint-Norbert d'Arthabaska produisirent une opposition afin de conserver, par laquelle ils réclamaient, par privilège, avant tout autre créancier, £2 10 10, pour le montant de la répartition que la terre vendue pour £10 devait pour la construction de l'église et sacristie de la paroisse de St-Norbert d'Arthabaska. Le Protonotaire prépara un projet de distribution des argents. Les frais du Shérif £11 18 6½; préparation du projet, £1 2 6; procédés, £0 10 0; frais privilégiés, £6 5 0; frais d'homologation, £2 10 0; montant à £22 6 0½. Ces frais furent divisés en cinq parts de £4 9 3 chacune. Ainsi, G. J. Pacaud, fut réparti à £17 16 9, et les Syndics à £4 9 3. Sur les £40, prix d'adjudication du No. 1, fut déduit £17 16 9, pour les frais, et £0 10 0 pour la Collocation, laissant une balance de £21 13 3 à être payés au créancier, par privilège de Bailleur de fonds, sur la terre No. 1. Sur les £10 provenant de la vente de la terre No 2, il fut d'abord déduit £4 9 3 pour la proportion des frais, laissant une balance de £5 11 9, qui fut répartie comme suit: Collocation, £0 1 9; opposition, £2 6 8; aux Syndics, £3 3 4; total £5 11 9. L'adjudicataire de la terre No. 1, refusa de déposer la balance qu'il redevait sur le prix de son adjudication pour deux raisons: la première, parce que cette balance lui appartenait en préférence à tout autre créancier, et que, par conséquent, personne n'avait intérêt à ce que cette somme fût rapportée en cour; la seconde, c'est que, s'il rapportait, en Cour, cette somme d'argent, on la pren-

drait pour faire un jugement de distribution dont il aurait la façon à payer en pure perte pour lui et qui ne profiterait qu'aux opposants dont il n'était nullement obligé de servir les intérêts. Il contesta de plus le projet de distribution qui selon lui devait être mis de côté : 1° Parce que les frais de vente par le Shérif devaient être supportés par chaque immeuble par part égale, car la vente de chaque immeuble avait coûté les mêmes frais. 2° Parce qu'il n'avait pas besoin d'un jugement de distribution, si les opposants en voulaient un, qu'ils eussent à en payer le prix. L'adjudicataire disait : " les opposants ne peuvent obtenir leur motion pour *folle enchère* contre moi ; j'ai payé aux officiers de justice ma juste moitié des frais de la vente qui doivent être supportés par chaque terre également, puisque les frais de la vente de chaque terre ont été égaux. Les opposants veulent me faire déposer l'argent afin qu'ils s'en servent pour faire un jugement de distribution, dont ils ont seuls besoin. Leurs droits ne sont pas établis comme les miens qui apparaissent par le certificat du Registrateur que je produis à mes frais pour prouver ma créance et mon privilège. Les opposants ont été obligés de faire une opposition pour constater leurs droits. Si leur position exige des frais et des dépenses, dois-je les supporter à mon détriment pour servir leurs intérêts ? Sur quelle loi se fonde-t-on pour m'obliger à dépenser mon argent au profit d'autrui ? s'il en était ainsi, la compagnie des plaideurs dans les Cours de Justice, deviendrait suspecte et dangereuse comme celle dont les honnêtes gens sont les victimes dans les lieux suspects et malfâmés. S'il faut absolument un jugement de distribution, qu'il soit fait aux dépens de la partie qui le sollicite et qui en a un besoin indispensable. Au reste, si tous les plaideurs doivent être punis pour avoir demandé justice aux Tribunaux, que le châtiment soit réparti également entre les parties intéressées ; que les frais de distribution soient divisés également entre les parties, puisque les frais pour constater l'une ou l'autre réclamation sont les mêmes. Ainsi justice égale envers tous et contre tous." Les opposants répondirent : " Que la pratique constante et invariable à Québec était que l'adjudicataire, dans tous les cas, devait déposer en cour, le montant de son adjudication, à moins qu'il ne donnât caution de le payer suivant l'ordre de la cour, et que tout créancier avait le droit de faire cette demande, même lorsqu'il apparaissait à la face de la procédure ne devoir recevoir aucune part de cet argent, qu'il suffisait d'être créancier pour faire la demande ; que les frais de la vente par le Shérif devaient être répartis d'après le prix de l'adjudication et non pas par moitié, comme prétendu dans l'instance actuelle, et que c'était sur le même principe que devaient se répartir les frais de la distribution des argents, et

que tout créancier avait le droit de provoquer un jugement de distribution des argents prélevés et que ces questions avaient mainte et mainte fois été décidées par la Cour Supérieure à Québec, et que c'était une pratique constante, établie depuis temps éloigné."

PER CURIAM: La motion pour folle enchère et la contestation sont liées ensemble. L'adjudicataire est obligé de déposer en Cour le prix de son adjudication; en conséquence de quoi, la Règle pour *folle enchère* sur lui est déclarée absolue. Quant à la contestation du projet de distribution, nul doute que les frais de vente et de collocation ont été les mêmes pour chaque terre, et qu'il serait plausible et juste d'en faire peser le poids par justes moitiés sur chaque immeuble, mais la pratique constante à Québec a été de faire la répartition de ces frais au *prorata* du prix réalisé par la vente de chaque immeuble, et la cour ne croit pas devoir se prononcer contre cet usage et cette pratique. [7 *J.*, p. 279.]

E. L. PACAUD, Proc. de l'adjudicataire G. J. Pacaud.

G. TALBOT, Proc. des Opposants.

RIVILEGE DE LA COURONNE.

COUR SUPÉRIEURE, Montréal, 30 septembre, 1862.

Coram SMITH, J.

BENJAMIN *vs.* BREWSTER et divers Opposants, and L'HON. GEO. E. CARTIER, Proc. Gen., *pro Regina*, Opposant et Contestant.

Jugé: Que la réclamation de la Couronne fondée sur un droit de fisc est privilégiée sur les biens meubles du débiteur insolvable. (1)

Par son opposition afin de conserver produite le 27 novembre, 1861, l'Honorable Procureur Général de Sa Majesté, réclamait, par privilège, à même les deniers provenant de la vente des biens meubles du Défendeur, la somme de £397 13, pour laquelle Notre Souveraine Dame la Reine avait été colloquée sur le produit de la masse des biens du failli Ruggles Wright junior; entre les mains du Défendeur, Benjamin Brewster, en sa qualité de Syndic à la faillite de Wright. Par le jugement sur le rapport de collocation (Dividend Sheet) rendu le 14 mars 1856, par la Cour de Banqueroute, il avait été ordonné au Défendeur, en sa qualité de Syndic, de payer telle somme à Notre Souveraine Dame la Reine, pour et en déduction d'un jugement qu'elle avait obtenu contre Wright, le 20 avril, 1843.

(1) V. art. 1994 C. C.

Le Rapport de collocation préparé par le Protonotaire n'ayant accordé à la Reine que la somme de £8 19 1, au marc la livre avec les autres créanciers de Brewster, l'Honorable Procureur Général contesta ce Rapport, sur le principe que, par la loi du pays, Notre Souveraine Dame la Reine avait un privilège sur tous les biens du Défendeur, pour le paiement de sa réclamation, et avait droit d'être colloquée de préférence à tous autres créanciers sur les deniers provenant de la vente des biens meubles du Défendeur qui était contraignable par corps au paiement de cette réclamation. Deux des Opposants répondirent spécialement à cette contestation : " That Her Majesty " had not and has not the privilege for the amount of Her claim " upon the proceeds of the goods of Defendant sold in this " cause, and had no right to be collocated by special privilege, " but was properly and legally collocated therein, *au marc la* " *livre* with the other creditors of Defendant. And the " privilege invoked in the opposition and contestation has no " legal existence and ought not to be granted "

" The Court having heard Opposants Ferdinand MacCulloch and consors, and Opposant Oscar A. Burton, and the Attorney General, on behalf of our Sovereign Lady the Queen, Opposant, by their respective Counsel, upon the merits of the contestation by the Attorney General, on behalf of our said Lady the Queen, of the Report of distribution made and fyled, considering that Ferdinand MacCulloch and Charles Hagar, Opposants, and Oscar A. Burton, Opposant, contesting the claim of the Attorney General for Her Majesty the Queen, have altogether failed to show any good reason in law for maintaining the conclusions of their contestation and for refusing to admit the privilege claimed by the Attorney General ; and, further, considering that the claim of the Attorney General is based on and founded on the *droit de fisc* due to Her Majesty the Queen, the contestations are dismissed with costs, and the claim of the Attorney General is allowed to the extent of three hundred and ninety seven pounds, thirteen shillings, with costs, rejecting the claim for interest. [7 *J.*, p. 281.]

L'HON. G. E. CARTIER, Procureur Général *pro Regina.*

ABBOTT and DORMAN, Avocats de F. MacCulloch et al.

ACTION BY THE ASSIGNOR OF A CLAIM.

SUPERIOR COURT, Montreal, 31st May 1861.

Coram MONK, J.

ORR *vs.* HÉBERT.

Held: That, quoad the *cédant*, the *cessionnaire* and the *débiteur*, indirect knowledge obtained by the *débiteur* that the debt has been transferred is equivalent in its effects to acceptance or signification; provided that there is nothing equivocal in the facts upon which this knowledge is based.

2. That a partial execution of the transfer and an acknowledgment by the *cédant* that payments on account made by the *débiteur* to the *cessionnaire* are good and the failure of the *cédant* to contest the declaration made to him (as Plaintiff in an action vs the *cessionnaire*) upon a writ of *saisie arrêt* after judgment to the effect that he the *débiteur* owes money to the *cessionnaire* in virtue of this transfer, are facts sufficiently unequivocal upon which to base this indirect knowledge. (1)

MONK J.: This is an action brought for the recovery of the sum of £129.10.6, due upon a deed of sale of a lot of land by Plaintiff to Defendant dated 28th Jan., 1854. The declaration alleges that the superficial extent of land held was 91 acres, 30 perches, and that the price stipulated was £2 per acre, total £185.

The Defendant meets this action by the following peremptory exception that the land contained only fifty acres and that the entire price was therefore only £100, instead of £185, as alleged by Plaintiff; that, at the passing of the deed, he paid £12 10, leaving a balance of £87 10, payable in four annual instalments of £21 17 6, the first of which was to become due on the 13th of July, 1854, and so to continue annually; that, by an act before Notaries, dated 10th March, 1854, Plaintiff transferred to Jamieson and Vicherman, among other things, the debt above mentioned; that Defendant having been informed of this transfer on the 17th August, 1855, paid £37 2 6 to Vicherman; that, afterwards, on the fifth October, 1855, Defendant paid to the same party £5 0 0, so that, on the 13th July, 1855, there remained due only the sum of £6 17 on the second instalment. On the 13th July, 1856, another instalment of £21 10 became due, making with the last named sum, £28 7; but Defendant alleges that Plaintiff never became proprietor of the debt after transferring it to the parties above named, and hence has no right to claim the same by this action. Moreover, it is further set forth that Plaintiff obtained judgment against Jameison and Vicherman on the 27th October 1855, for a large sum of money, and upon this judgment, on the 12th November, 1855,

(1) V. art. 1571 C. C.

saisie-arrêt après jugement issued to attach in the hands of Defendant all moneys by him owing to Jamieson and Vicherman ; that on the 4th December, 1855, Defendant declared that the owed Jamieson & Vicherman the balance of the purchase money thus transferred, and this writ of *saisie-arrêt* is still in full force, and Defendant prays that present action be in consequence dismissed. The Plaintiff answers that he has always been ready to give cre it to Defendants for moneys paid to Vicherman and Jamieson, and offers to give security that Defendant will never be troubled by them for moneys now sued for. It is also alleged, in the answer, that the declaration of Defendant as *tiers-saisie* above referred to was not a declaration upon which Plaintiff could obtain jndgment, and that Vicherman and Jamieson have absconded from this province. The evidence adduced establishes the fact of the transfer of the 10th March, 1854, and the payment alleged by Defendant to have been made by him to Jamieson and Vicherman, also the issue of the *saisie-arrêt* and the seizure of the money in the hands of Defendant as belonging to Jamieson and Vicherman, and Plaintiff's omission to contest the declaration of Defendant *tiers-saisi*. The question of law which the court is now called upon to decide is simply this : Whether the indirect kowledge obtained by a debtor that the debt owing by him has been transferred is or is not, in so far as the *cédant*, the *cessionnaire* and the *débiteur* are concerned, equivalent in its effets to acceptance or signification. Every lawyer is aware of the controversy which existed for many years in France upon this point, and of the contradictory *arrêts* which were rendered. The opinion, however, which has prevailed is that, in so far as regards these parties, the transfer does take effect by this indirect knowledge. Troplong, in his *Contrat de Vente*, n° 900, commenting upon the opinion of Ferrière and Brodeau says : " elle compte la Cour de Cas-" sation parmi ses adversaires, et je crois que, si les faits dont " on veut induire la connaissance du transport par le débiteur " ont quelque chose de non équivoque, si elles ne laissent aucun " doute sur la volonté du cessionnaire de se prévaloir de la " cession, les adversaires de Ferrière doivent l'emporter." Here, there is not only no doubt, but the *transport* received its execution in part : payments were made to the *cessionnaire* by the *débiteur* which are acknowleged to be good by the *cédant* himself, apart from the *saisie-arrêt* and the uncontested declaration of Defendant as *tiers-saisi* that he owed money to Jamieson and Vicherman, in virtue of the transfer of the 10th March 1855. I am of opinion that the facts and the law of the case impose upon the court the obligation of dismissing this

action. It is dismissed. The Plaintiff may have recourse upon the *saisie-arrêt*.

" Judgment: Considering that, previous to the institution " of this action, Plaintiff, on the 10th day of March, 1854, " transferred to third parties the amount claimed by Plaintiff " in and by his *demande*; and, considering that the transfer " was in part executed previous to the institution of the ac- " tion, doth maintain the exception by Defendant pleaded, " and doth dismiss Plaintiff's action with costs." (7 *J.*, p. 282 et 12 *D. T. B. C.*, p. 401.)

A. and W. ROBERTSON, for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

DISTRACTION DE FRAIS.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1 Sept. 1862.

Before: Sir L. H. LaFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

CONVERSE, Appellant, and CLARKE, Respondent.

Jugé: Qu'une motion faite en appel pour distraction des dépens encourus en Cour inférieure sera accordée. (1)

Judgment was rendered in the Superior Court, Montreal, against Appellant, for $290, for work and labor. By the decision in appeal, the judgment of the Court below was modified and reduced to nine dollars, with costs as in an action of that class, and with costs in appeal. The attorneys of Plaintiff below (Respondent) made a motion in appeal for *distraction* of the costs *in the Court below*, which motion was granted. (12 *D. T. B. C.*, p. 402.)

ABBOTT and DORMAN, for Appellant.

LEBLANC and CASSIDY, for Respondent.

OPPOSITION A JUGEMENT.

COUR DE CIRCUIT, Québec, 25 septembre, 1862.

Présent: STUART, Juge.

MARTINEAU, Demandeur *vs.* CADORET, Défendeur.

Jugé: Qu'un Défendeur peut produire une opposition au jugement rendu contre lui en vacance, même après le retour du premier bref d'exécution, s'il n'appert pas par le rapport de l'huissier à ce bref qu'un jour ait été fixé pour la vente des effets saisis. (2)

(1) V. art. 482 C. P. C.

(2) V. art. 484 C. P. C.

Le sept mai dernier, un jugement fut rendu contre le Défendeur, Cadoret, pour £22 2 0, par le greffier de la Cour de Circuit, en vacance. Quinze jours après, un *fieri facias de bonis* émana contre les biens du Défendeur, rapportable le 16 juin. Dans l'intervalle, savoir le 3 juin, le Défendeur (en communauté de biens avec son épouse) l'autorisa à faire une opposition afin d'annuler. Cette opposition fut renvoyée, et, le 25 juin, le Demandeur prit un *venditioni exponas* rapportable le 20 septembre. Le 30 juin, le Défendeur lui-même produisit une opposition au jugement rendu par le greffier le septième jour de mai. Le 20 septembre, le Demandeur fit motion pour le renvoi de cette opposition, alléguant, 1° que l'opposition n'avait pas été produite dans les délais voulus par la loi ; 2° que le fait d'avoir autorisé son épouse, commune en biens avec lui, à faire une opposition à la saisie était un acquiescement au jugement de la part du Défendeur.

LINDSAY, pour le Demandeur, en faisant cette motion, cita les statuts refondus du Bas-Canada, chap. 83, sec. 115, sous-sec. 2, où il est dit que : " toute opposition à un jugement en vacance sera produite dans le délai qui surviendra entre le jour de la saisie et celui fixé pour la vente des biens saisis," et il dit : Il est bien vrai qu'il n'appert pas, par le rapport de l'huissier au premier acte de saisie émané en la cause, qu'un jour ait été fixé pour la vente des biens saisis, mais à cela je repondrai que le Défendeur a perdu le droit de produire son opposition au jugement, parce que, non seulement il ne l'a pas produite dans le délai voulu par la loi, c'est-à-dire, entre le jour de la saisie et celui fixé pour la vente ; (un jour était fixé pour la vente nonobstant qu'il n'appert pas par le rapport de l'huissier) mais son opposition n'a été produite que longtemps après le rapport du writ de *fieri facias*, et sur l'émanation d'un writ de *venditioni exponas*.

TALBOT, pour l'Opposant, rencontra cette motion avec la clause des statuts refondus suscitée, et prétendit qu'il était dans les délais voulus pour produire son opposition, vu qu'il n'apparaissait pas par le rapport de l'huissier au premier writ d'exécution émané en la cause qu'un jour eût été fixé pour la vente des effets saisis.

STUART, Justice : In this cause, a judgment was rendered against Defendant by the clerk of the Court. An execution issued and was subsequently returned into Court with the bailiff's certificate that he could not sell on account of an opposition put in by Defendant's wife. This opposition was dismissed and a *venditioni exponas* issued, Defendant himself stops this sale by the production of his opposition *au jugement*. The clause of the Statute, under which these oppositions are allowed, establishes the time in which they must

be produced "between the seizure and the day fixed for the sale," there is no proof whatever before me that a day was fixed for the sale, and, although the Defendant allowed a long time to intervene before opposing this judgment, I must take the letter of the law, and not imagine the intention of the Legislature For this reason, therefore, the motion cannot be granted. With regard to the Defendant's acquiescing in the judgment by authorising his wife to oppose the first seizure, I cannot now take it into consideration, because it is rather a plea to the merits of the opposition than the ground of a motion for its dismissal. Jugement, motion renvoyée. (12 *D. T. B. C.*, p. 423.)

LINDSAY, pour le Demandeur.

TALBOT, pour l'Opposant.

ELECTIONS MUNICIPALES.

SUPERIOR COURT, Quebec 16th April, 1862.

Before TASCHEREAU, Justice.

LEE *vs.* BURNS.

Jugé : Que, quoique deux élections de conseillers de ville aient eu lieu le même jour, l'une pour remplir une vacance ordinaire, et l'autre causée par la résignation d'un membre du conseil, néanmoins, le candidat ayant le moins de votes devra remplir la vacance ordinaire, et rester en office pour la période la plus longue, s'il avait été nommé pour remplir cette vacance ; et ce parce que la nomination par les électeurs détermine le caractère de l'élection, et tout vote donné à telle élection doit être censé avoir été donné conformément à la réquisition des électeurs. (1)

On the 3rd December 1860, the nomination of two Councillors to represent St. Peter's Ward took place, one to fill the vacancy occasioned by the retirement of Burns, the Defendant, whose term of office was to expire in January then following, the other that caused by the previous resignation of office of Shaw ; at this nomination, certain electors demanded that Burns should be re-elected for the ensuing three years, others that James Dinning should be elected to fill the vacancy created by the resignation of Shaw, and again, others demanded that Bourgette should be nominated to fill one or other of the vacancies ; on these several nominations, a poll was granted for the election of two City Councillors to represent St. Peter's Ward ; on the 7th December, 1860, public notice was given that the election of two Gouncillors to represent St. Peter's Ward, one of them in the room of Shaw,

(1) V. art. 361 C. M.

would take place between the 15th and 21st of December then next; such election having been held, the board of revisors, on the 26th December, 1860, reported to the Council that they found the votes in St Peter's Ward were, for Burns 260, for Dinning, 273, and for Bourgette 151. They also reported that Burns was re-elected for three years, and Dinning to replace Shaw. Lee, the Petitionner, complained that Defendant illegally remained in office after the period at which Shaw would have retired, and that Dinning having obtained the greater number of votes, filled the seat vacated in the ordinary way, and had a right to retain his seat for three years.

ANDREWS, senior, for Petitioner, argued that the law had enacted two rules with reference to the retiring of Councillors from office: 1st. That, when two elections to fill the ordinary and extraordinary vacancies occur on the same day, the Councillor having the lesser number of votes shall go out of office first, 18 Vic., ch. 159, sec. 26; 2° When the extraordinary vacancy is filled at any other period then that of the annual election, the Councillor elected shall retire when the Councillor in whose place he has been elected would have gone out of office had no other vacancy occurred, 18 Vic., ch. 159, sec. 40; that, at the nomination, the electors were called upon to nominate two persons to be Councillors for the ward to supply two vacancies. They were not required to name a candidate to replace Burns, and a candidate to replace Shaw, but to nominate for election two candidates to fill the vacancies occasioned by the resignation of the one, and the expiry of the term of office of the other, they had no right to nominate either candidate for one of the vacancies in particular, their duty was confined to the nomination of two candidates to fill the vacancies; the law called upon them to provide councillors to fill the vacancies in the ward, and declared that the candidate having the less number of votes should retire first, there was, at the election in question, but one election for two councillors, there being three candidates named, a contest was necessarily raised between each of them, each being interested to obtain the greatest number of votes, the consent of the candidates to be nominated or elected was not required, the voters had a right to nominate and elect any two qualified persons to fill the vacancies, neither the candidate or those nominating could confine the action of the voters to the filling one of the vacancies in particular by one or other of the candidates, three being nominated, when there were only two vacancies, it was for the voters to decide which two should fill the vacancies, and which one should receive the highest number of votes, there was a contest between the candidates and voters to ascertain this. If Bourgette had not been nominated, the contest would

have been between Dinning and Burns only, and each voter had a right to record his vote to ascertain who would obtain the greater number. The electors who nominated Dinning, had no right to say he should replace Shaw, or dictate to the voters that they should so vote. The contest was as much between Burns and Dinning as between Bourgette and Burns, and as much so between Dinning and Bourgette, for, if it be said the contest was not between Burns and Dinning, then had Dinning obtained but three votes, while Burns had obtained 300, Dinning would have been elected and Burns not, supposing Bourgette had obtained à larger number of votes than Burns. The sole object of the nomination was that the candidates for councillors should be publicly known, and that no improper persons should be elected, 18 Vict., ch. 159, sec. 21, and 19 Vict. ch. 69. The law no where gives the electors power to nominate for a particular vacancy, and provides no machinery for such voting, the form of voting tickets furnished by the statute excludes any such indication of the particular vacancy to be filled, providing only for the voting of candidates, one or more for the ward. To suppose a power in the electors to particularize, makes the 26th sect. of none effect. By this clause, if at the period of the ordinary election an extraordinary vacancy is also filled, the candidate receiving the less number of votes is to fill it, by the 40th clause if the extraordinary election take place at any other period, the member elected shall fill it. Either the elections to fill the ordinary and extraordinary vacancies could take place on the same day, and then, Dinning having the larger number of votes should remain in office for the longer period, or they could not take place on the same day, and then both elections are null, and Burns has no right to his seat. In England,such elections taking place on the same day are held to be null, (1) and the 1st Vict., passed to legalize some that had thus taken place, directed that the candidate having the less number of votes should represent the extraordinary vacancy. Our statute seems to say the same thing prospectively, but if it do not, then the elections here as there should be held to be void. In England, it is not necessary to nominate, and it is there held that electors cannot be controlled by a nomination, here a nomination of candidates for the ward is required, but the electors cannot be controlled as to the particular vacancy in the ward. No power is given by law here to the electors to nominate for a particular vacancy, none is given to the revisors to declare the candidate elected for such vacancy, and none is conferred upon the council to make any such declaration, but it is pro-

(1) *Regina* vs. *Rowley*, 16 jur. 872, Q. B. ; 1 Harrison's, *Digest*, 1861.

vided that the electors shall nominate for the ward, the revisors shall declare the number of votes given for each candidate, and the council shall declare those candidates elected who have the largest number of votes, therefore, if the two elections taking place at the same time can be looked upon as legal, or if it be held to be illegal, Defendant has no right to his seat, in the former case, he must retire in favor of Dinning, and in the latter, he must also retire and another election be held.

VANNOVOUS, for Defendant, argued that the 19 Vict., ch. 69, which made it imperative that the electors should nominate the candidates for the council, by implication, repealed the 26, sec. of the 18 Vict., ch. 159, on which the petitioner relied. That the voting at the election must be pursuant to the nomination; that the nomination of Bourgette for one or other of the vacancies was void; that the case was to be decided as it presented itself, and the court was not called upon to decide cases which might happen.

ANDREWS, in reply, stated that the cases he had put were merely illustrative, to show the soundness of his reading of the law and to show that under Defendant's interpretation of it, many cases would arise which would render the law inoperative; that the 19 Vict., requiring a nomination, could not, by implication, repeal the 18 Vict., ch. 159, because the 18 Vict., itself directed that the candidates should be nominated, although it did not go the length of the 19 Vict., to declare that the candidate should not be elected without a nomination.

TASCHEREAU, Justice: The elections for the two vacancies, although had on the same day, and at the same time and place, were two distinct and separate elections, each being for a particular purpose, as specified in the written requisitions of the electors. By law, it is provided that a nomination shall take place previously to the election, and that, at this nomination, by a requisition in writing, the electors must not only declare whom they wish to represent them, but must also state the manner in which they wish to be represented. This requisition then stamps the character of the candidature, and whatever votes are recorded must be considered as recorded in accordance with the wishes of the electors as expressed in the requisitions. At this election, the requisition in favor of Burns was to fill the place of the retiring councillor, that in favor of Dinning was to fill the vacancy occasioned by the resignation of Shaw, and yet it is pretended that because Dinning had the larger number of votes, he is entitled to fill the place of the retiring councillor. The position of the petitioner cannot be maintained for one instant. The elections were conducted

in entire conformity with the law. The petition must therefore be dismissed. (12 *D. T. B. C.*, p. 425.)

ANDREWS and ANDREWS, for Petitioner.

VANNOVOUS, for Defendant.

RATIFICATION DE TITRE.

SUPERIOR COURT, Montreal, 28 juin, 1861.

Before: BERTHELOT, Justice.

Exparte, ROBINSON, for Ratification of Title, and POIRIER, Intervening Party.

Jugé: Que lorsque le certificat du registrateur fait apparaître des hypothèques comme existant sur un immeuble, quant au titre duquel on demande des lettres de ratification, une motion par une partie intervenante demandant qu'il lui soit permis de produire des quittances, et que les hypothèques soient tenues pour satisfaites, pour toutes fins requises, ne peut être accordée. (1)

BERTHELOT, Justice: In this cause, an application is made for a ratification of title, and it appears from the Registrar's certificate produced under the 36th chapter of the consolidated statutes of Lower-Canada, that a large number of mortgages are registered against the property. On this, an intervening party makes a motion to be allowed to produce and file some eighteen or twenty notarial discharges, and praying that, in consequence, these debts be declared satisfied and extinguished *pour toutes fins requises*. I do not think this motion can be granted under the law as it stands. Perhaps the receipts might be registered and a new certificate obtained. (2) Motion rejected. (12 *D. T. B. C.*, p. 431.)

DAY and DAY, for petitioner.

MOREAU, OUIMET and MORIN, for intervening party.

FRAUDE.—VENTE DE CREANCE.

BANC DE LA REINE, EN APPEL, Québec, 17 juin 1862.

Présents: Sir L.H. LAFONTAINE, Bart., Juge-en-Chef, DUVAL, MEREDITH et MONDELET, Juges.

BERLINGUET, Appelant, et DROLET, Intimé.

Jugé: 1o. Que le transport d'un contrat ne sera pas mis de côté sur une allégation de fraude par un créancier du cédant, la prétendue fraude

(1) V. art. 955 C. P. C.

(2) *Sed vide*. 25th Vic., cap. 11, sec. 5.

consistant dans le transport d'argent dû sur cette partie du contrat qui était complétée à l'époque du transport.

2o. Que, dans tel cas, si le montant transporté excède la valeur des ouvrages encore à faire, les créanciers du cédant pourront contraindre le cessionnaire au remboursement du surplus.

L'Intimé avait institué, devant la Cour Supérieure, à Québec, une action rescisoire contre Louis Thomas Berlinguet, l'Appelant, François Xavier Berlinguet, son fils, et la Fabrique de la paroisse de Beauport, demandant l'annulation, pour cause de fraude, d'un acte de cession d'un marché consenti par François Xavier Berlinguet, à son père, Louis Thomas Berlinguet, l'Appelant. Le marché avait été exécuté entre la Fabrique et François Xavier Berlinguet. Ce dernier avait entrepris divers ouvrages pour la Fabrique, moyennant £5000, payables en différents temps pendant l'exécution des travaux. François Xavier Berlinguet commença l'exécution de son marché, mais, avant de l'avoir rempli, par acte notarié fait avec son père, dûment signifié à la Fabrique, il céda ce qui restait à faire du marché à son père, l'Appelant, qui s'obligea de remplir les conditions de ce marché. En considération de quoi, F. X. Berlinguet lui céda et transporta la somme de £4,300, balance due sur le prix de l'entreprise. L'Intimé, par sa déclaration, avait en outre allégué qu'il était, à l'époque du transport, et longtemps avant, avait été créancier de François Xavier Berlinguet, alors insolvable ; que, depuis la cession du marché, François Xavier Berlinguet avait toujours surveillé ces travaux comme l'engagé (*foreman*) de son père. Les deux Défendeurs Berlinguet, seuls contestèrent séparément l'action, quoique leurs plaidoyers fussent les mêmes. La défense du père, seul appelant, était que, lors de la cession du marché, et dès longtemps avant, François Xavier Berlinguet était incapable de remplir ses engagements envers la Fabrique ; que la cession du marché avait été faite dans le seul intérêt de la Fabrique, et pour sauvegarder ses justes droits, sans fraude ni collusion aucune. La cour inférieure rendit le jugement suivant : " Considérant que le transport de marché a été fait par François Xavier Berlinguet, et accepté par son père, dans le but de frauder les créanciers de François Xavier Berlinguet ; la cour annulle et met de côté le transport de marché. " De ce jugement, Louis Thomas Berlinguet interjeta appel, soutenant qu'il y avait erreur, et demandant que ce jugement fût infirmé par la Cour d'Appel.

MIVILLE DE CHÊNE, pour l'Appelant, dit, que le jugement de la Cour Inférieure devait être infirmé, parce que, lors de la cession, François Xavier Berlinguet possédait divers biens meubles et immeubles plus que suffisants pour payer l'Intimé et sur lesquels l'Intimé devait d'abord se venger ; ensuite que

François Xavier Berlinguet avait aussi plusieurs autres contrats pour construction d'Eglises, à divers endroits, pour des montants au dessus de £10,000 ; que, lors de la cession, François Xavier Berlinguet avait reçu de la Fabrique une somme plus que suffisante pour payer tous les ouvrages qu'il avait alors faits ; que le contrat entre la Fabrique et François Xavier Berlinguet étant pour £5000, François Xavier Berlinguet ayant reçu, tel qu'il était prouvé par l'intimé lui-même, celle de £675, et n'ayant transporté à son père que celle de £4300 ; il était resté entre les mains de la Fabrique une somme de £25, plus que suffisante pour payer la réclamation de l'Intimé qui n'était que de £7 8 9 ; que, par conséquent, l'Intimé aurait pu être payé en contestant la déclaration de la Fabrique, ayant saisi et arrêté ces argents entre ses mains ; que la cession ou le transport n'etait pas une cession d'une dette claire et liquide, et exigible, mais, au contraire, une cession d'ouvrages à faire, en considération d'une somme à percevoir pour en payer le prix ; et que la somme ainsi transportée pour payer les dits ouvrages ne deviendrait due qu'en autant que les ouvrages seraient faits, et que, par l'évènement, il se pourrait que cette somme ne serait jamais due ; qu'il y avait une grande différence entre cette cession et le transport d'une créance qui n'était pas encore échue ; parce que la seconde était due, seulement le terme n'était pas expiré, et deviendrait toujours à écheoir sans l'action du cédant ; au lieu qu'il était toujours incertain si la première le deviendrait jamais, pour ces travaux, il fallait des materiaux pour de fortes sommes, payer des gages d'ouvriers aussi pour des sommes considérables ; et si l'ouvrier devenait incapable de continuer son contrat, parce qu'il n'avait pas le moyen d'avoir des matériaux et de payer ses ouvriers et que l'ouvrage ne se fît pas, est-ce qu'à l'expiration de chaque terme la Fabrique serait obligée de payer sans que les ouvrages se fissent? Non, la Fabrique n'étant tenue de payer que si les ouvrages se faisaient, dirait au contracteur ou aux créanciers, faites les ouvrages et je paierai ; que, dans l'impossibilité où se trouvait François Xavier Berlinguet de compléter son contrat, il avait dû céder ce qui en restait à faire à l'Appelant, sa caution pour l'exécution des ouvrages. Et si François-Xavier Berlinguet n'avait pas consenti ce transport à son père, étant incapable de remplir ses engagements, il aurait été responsable, en dommages et intérêts, envers la Fabrique, aurait entraîné dans sa ruine l'Appelant, sa caution, sans qu'en aucune manière l'Intimé en pût profiter ; que l'Intimé n'avait jamais travaillé pour l'église, et n'avait aucun privilège sur l'argent provenant de ces ouvrages, et que François-Xavier Berlinguet avait le droit de faire cette cession de marché, ou toute autre transaction de la même nature, qu'il jugeait à

propos ; cela étant plutôt profitable que nuisible aux intérêts de ses créanciers ; que, quant à ce qui était des matériaux qui étaient alors sur la place, ils n'avaient pas été transportés à l'Appelant ; que, par conséquent, l'Intimé devait les vendre, ou les saisir et arrêter entre les mains de l'Appelant s'il en était en possession ; que l'Appelant étant la caution de François Xavier Berlinguet pour la due exécution des dits ouvrages, avait le droit, dès que François Xavier Berlinguet s'avouait incapable de les continuer, de forcer François Xavier Berlinguet à lui en faire la cession, si l'Appelant voulait les terminer ; d'autant plus que, par son cautionnement, il s'était engagé personnellement à finir les ouvrages si François Xavier Berlinguet ne les finissait pas ; que si l'Appelant n'eût pas accepté la cession et terminé les ouvrages, l'Intimé et les créanciers de François Xavier Berlinguet n'auraient retiré aucun avantage du marché, mais, au contraire, la Fabrique, dont les ouvrages auraient été arrêtés aurait eu son recours en dommage, ce qui aurait diminué d'autant l'actif de François Xavier Berlinguet.

LANGLOIS, pour l'Intimé : La preuve des faits propres à établir l'insolvabilité de F. X. Berlinguet, son intention et son but de frauder ses créanciers, au moyen du transport ; la simulation de cet acte et le concours volontaire de l'Appelant dans la fraude pratiquée, est tellement abondante et certaine qu'il serait oiseux de la commenter. L'Intimé se contente de réfuter sommairement quelques unes des prétentions de l'Appelant. Son fils, dit l'Appelant, avait, lors du transport, reçu de la Fabrique, à-compte du prix d'entreprise, une somme plus considérable que le montant des travaux alors exécutés, donc, conclut-il, il n'y avait pas fraude. Si cette prétention n'est pas fondée en fait il est inutile de la considérer au point de vue de la loi. Prenant les plus basses estimations faites par les témoins, la valeur des travaux exécutés lors du transport excèderait le montant payé d'environ £200 0 0. L'Appelant prétend que s'étant porté, envers la Fabrique, caution pour son fils, il n'y avait pas fraude de sa part d'accepter le transport de l'entreprise pour son compte. En supposant que, comme caution, il eût payé pour son fils ou fait des travaux pour lui, cela l'aurait simplement constitué créancier du débiteur principal, et dans ce cas, la cession du prix de l'entreprise n'en aurait pas moins été une préférence frauduleuse que les autres créanciers auraient eu pareillement droit d'attaquer. Mais ce cautionnement n'était que conditionnel, c'est-à-dire, il ne s'était obligé à exécuter lui-même les travaux entrepris que dans le cas où son fils serait devenu incapable de les faire lui-même par mort, maladie ou infirmités ; ce sont là les seuls cas où il pouvait se trouver lui-même engagé comme caution.

Dans ses griefs d'appel, l'Appelant prétend que le jugement est erroné. 1o. *Parce que, lors de la cession il était dû à F. X. Berlinguet diverses sommes d'argent par diverses personnes plus que suffisantes pour payer la réclamation de l'Intimé;* 2o. *Parce que, lors de la cession, F. X. Berlinguet possédait divers biens meubles et immeubles d'une valeur plus que suffisante pour payer la réclamation de l'Intimé.* Remarquons d'abord que l'Appelant n'a pas, par ses plaidoyers, requis la discussion de ces biens. Quoi qu'il en soit, il est établi, dans la cause, que les sommes d'argent ainsi dues à F. X. Berlinguet étaient des prix de diverses autres entreprises qu'il exécutait dans le même temps, et qu'il a aussi, vers la même époque, cédés et transportés à l'Appelant sous les mêmes circonstances de fraude qui ont accompagné l'acte attaqué dans le présent procès. Les biens mobiliers au moyen desquels l'Appelant prétend que l'Intimé aurait pu être payé, n'appartenaient pas à F. X. Berlinguet, mais bien à lui-même. D'ailleurs, la discussion en a été faite longtemps avant l'institution de l'action en cette cause par un autre créancier, Edouard Nadeau. La propriété immobilière que l'Appelant prétend avoir appartenu à son fils, était située à Cacouna, dans un autre district. C'était une petite maison de campagne qu'il y avait fait construire; il n'avait pas payé le terrain, ni le coût de la construction de la maison; il a rétrocédé cet immeuble à Pierre Gosselin, pour demeurer quitte envers lui de ce qu'il lui devait pour la construction de la maison qu'il y avait érigée.

" Considérant que l'Intimé, par sa déclaration en la Cour Inférieure, allègue que le marché et transport entre F.X. Berlinguet et L. T. Berlinguet, son père, fait par acte passé le 27 octobre, 1857, est un acte simulé, qui n'a pas été suivi de tradition, et a été fait dans le but d'empêcher l'Intimé et les autres créanciers de F. X. Berlinguet d'exercer leurs droits contre lui, et faire saisir les matériaux non employés et le prix stipulé pour les ouvrages mentionnés au transport. Considérant que, par la preuve offerte, il est constaté que l'acte de marché et transport a été fait de bonne foi et dans le but de procurer à L. T. Berlinguet les moyens de parfaire les dits ouvrages aux termes du marché auquel le transport réfère; que les droits et les intérêts de l'Intimé n'ont été en aucune manière affectés par le transport, et que le contrat a été suivi de tradition, L. T. Berlinguet ayant pris en son nom et sur sa responsabilité la direction de la confection des ouvrages, du consentement *de la Fabrique,* à laquelle le transport a été dûment signifié, et au vu et su de tous les employés aux ouvrages Considérant que, si la somme de £4,300 transportée par le susdit acte à L. T. Berlinguet excède la valeur des ouvrages

alors à parfaire, eu égard aux prix stipulés pour les ouvrages en entier, les créanciers ont bien le droit d'obliger L. T. Berlinguet de rembourser tel excédant qui sera constaté, mais que ce fait ne peut justifier une demande pour obtenir la rescision du dit acte de marché et transport. Considérant que, pour les raisons *susdites*, il y a erreur dans le jugement de la Cour Supérieure, qui annulle le susdit marché et transport; cette cour annulle et met au néant le jugement ainsi prononcé par la Cour Supérieure le 4 février, 1851; et, procédant à rendre le jugement que la dite cour aurait dû prononcer, cette cour déboute l'action de l'Intimé, Demandeur en Cour Supérieure. L'Honorable M. le Juge MEREDITH: *dissentiente.* (12 *D. T. B. C.*, p. 432.)

MIVILLE DECHÊNE, pour l'Appelant.

CASAULT et LANGLOIS, pour l'Intimé.

BILLET PROMISSOIRE.—IMPUTATION DE PAIEMENT.

BANC DE LA REINE, EN APPEL, Montréal, 1er septembre, 1862.

Présent: Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, DUVAL, MEREDITH, et MONDELET, Juges.

BROOKS, et al., Appelants, *et* CLEGG, Intimé.

Jugé: 1° Que les signataires d'un billet peuvent opposer au porteur d'icelui, qui ne l'a reçu qu'après l'échéance, et qui n'est de fait qu'un prête-nom, tous les moyens d'exception qui pouvaient être plaidés au véritable creancier; et obtenir la déduction des intérêts usuraires compris dans le billet, et aussi des paiements faits sur icelui. (1)

2° Que les paiements faits sans imputation exprimée, doivent être imputés préférablement sur la créance qui est cautionnée, et qui porte intérêt. (2)

Sir L. H. LAFONTAINE, Bart. Juge-en-Chef: Voici le précis de la déclaration du Demandeur: Le 23 novembre, 1855, billet des Défendeurs, qui s'obligèrent solidairement à payer dans un an, à l'ordre de Lorenzo T. Kendall, $1232, pour valeur reçue, avec intérêt, à compter de son échéance, c'est-à-dire, à compter du 23 novembre, 1856, lequel billet fut endossé, le même jour, par Kendall, en faveur du Demandeur. Il est encore dû, sur ce billet, la somme de $746. Conclusions au paiement de cette dernière somme, avec intérêt et dépens. L'action a été

(1) Par le S. du C. de 1890, 53 V. ch. 33, s. 36 et 88, si un billet promissoire en souffrance est négocié, il ne peut l'être qu'en restant sujet à tout vice de titre l'affectant lors de son échéance.

(2) V. art. 1161, C. C.

intentée le 22 juin, 1860. Voici l'analyse de la défense : Dans une exception péremptoire perpétuelle en droit, après avoir admis qu'ils ont fait et signé le billet, les Défendeurs disent que le billet n'a pas été endossé par Kendall au Demandeur le jour de sa confection, mais a été ainsi endossé bien longtemps après son échéance, c'est-à-dire, un mois avant l'introduction de l'action, et cela sans aucune considération, mais seulement pour mettre le Demandeur en état de poursuivre en son nom ; les Defendeurs ont, par conséquent, le droit d'opposer les mêmes défenses qu'ils auraient pu opposer à une action intentée au nom de Kendall, et celui d'imputer tous les paiements faits à Kendall avant son endossement ; que la seule considération donnée par Kendall pour le billet a été la somme de $1100 par lui prêtée à William Brooks, à la date du billet, qui comprend l'intérêt à 12 p. 100 sur la dite somme, pour une année à compter de sa date, lequel taux d'intérêt était illégal et usuraire et ne peut être recouvré. Le 22 nov., 1856, ils ont payé à compte $150, ainsi qu'endossé sur le billet, et le 16 avril, 1859, Charles Brooks a payé en à-compte $400 à Kendall, par un billet signé de William Brooks et par la société de Brooks, Frères, société de commerce alors existant à Sherbrooke, pour la somme de $400, payable solidairement par eux à Kendall, avec intérêt à 10 par 100. Le 21 mars, 1859, William Brooks a payé à Kendall $130, étant le prix d'une paire de bœufs qu'il lui a donnés en paiement. Le 27 juin, 1859, William Brooks a payé à Kendall $25, et, le 18 août suivant, il lui a payé $25 ; de plus, le 8 sept., il a payé à la société de Brooks Frères, pour Kendall et à sa demande, la somme de 36\frac{37}{100}$. Le 14 octobre, suivant, William Brooks a payé à Kendall $50 ; le 5 novembre suivant, une autre somme de $20, et, le 18 du même mois, une autre somme de $25. Le 18 janvier, 1860, ils ont payé à la société Brooks Frères, pour Kendall, et à sa demande, 26\frac{70}{100}$; le 1er février suivant, à H. Pease, pour Kendall, et à sa demande, $4, le 23 décembre, 1859, Charles Brooks a payé à Kendall $50, et ensuite, le 15 février, 1860, $50. Le 18 avril, 1860, Charles Brooks, sur la représentation de Kendall qu'il était encore dû autant sur le billet en question, ce qui, de fait, n'était pas vrai lui a payé $456, Charles Brooks ignorant alors le montant des à-comptes donnés par William Brooks. Toutes les sommes ainsi payées à Kendall, excédant la somme de $1100, en capital et intérêt, et, lors de tous ces paiements, Kendall était le créancier et porteur du billet, et ce n'est qu'après le dernier de ces paiements que Kendall a transporté le billet au Demandeur qui n'est dans l'action qu'un prête-nom, n'ayant donné aucune valeur, et n'étant rien dû alors sur le billet. Dans une réponse générale le Demandeur dit que le billet lui a été transporté pour bonne et valable considération par lui payée à Kendall. Dans

une réponse spéciale, il dit que le billet n'est pas entaché d'usure, ayant été donné pour une dette alors due à Kendall par William Brooks, Charles Brooks devenant la caution de ce dernier ; que le billet de $400, du 16 avril, 1859, a été remis au Demandeur par William Brooks, pour être endossé par Kendall en faveur de A. C. Scarth, à qui Kendall devait alors $400, et avec l'expresse condition que, lorsqu'il aurait été payé, le montant en serait porté en déduction du billet, objet de la présente action, mais que le billet de $400 n'a jamais été payé ; que, le 2 décembre, 1856, William Brooks et Samuel T. Brooks consentirent solidairement en faveur de Kendall un autre billet pour $84 $\frac{87}{100}$, valeur reçue, payable dans un an ; et, le 6 juillet, 1857, William Brooks, conjointement et solidairement, avec George Brooks, fit un autre billet signé " Wm Brooks & Cie " et par George Brooks, à l'ordre de Kendall pour $231 $\frac{75}{100}$, valeur reçue, payable dans six mois. Il admet ensuite que la somme de $50 payée par Charles Brooks, le 23 décembre, 1859, et celle de $456 payée par lui le 18 avril, 1860 ont été ainsi payées en à-compte du billet qui fait l'objet de cette action ; mais que toutes les sommes payées par William Brooks à Kendall l'on été non en à-compte de ce billet, mais bien en à-compte des deux billets du 2 décembre, 1856, et du 6 juillet, 1857 ; 1° il est évident que le billet en question comprend $132 pour intérêts à 12 p. 100, qu'il faut en déduire, étant usuraires. Le billet ne serait donc censé être que de $1100, avec intérêt àcompter de son échéance ; 2° William Brooks étant le débiteur principal du billet, Charles Brooks, l'autre Défendeur, ne l'a signé que comme caution. Ceci est prouvé par Charles Brooks, entendu comme témoin de la part du Demandeur lui-même. De plus, c'est admis par ce dernier dans le reçu du 18 avril, 1860, par lui donné à Charles Brooks pour $456, " to apply on note signed by him as security for William Brooks in my favor. " Ici, il y a imputation par écrit. Mais, lorsque l'imputation n'est faite ni par le créancier ni par le débiteur : " l'imputation doit se faire plutôt sur celles qui produisent intérêt, que sur celles qui n'en produisent point. " Et encore : " L'imputation se fait plutôt sur la dette pour laquelle le débiteur avait donné des cautions, que sur celles qu il devait seul ; " (1) 3° il faut imputer, d'après ces règles, la somme de $706 que, dans son articulation de faits, le Demandeur admet avoir reçue en acompte du billet en question, en quatre paiements ; de plus, la somme de $50, que William Brooks a payée au Demandeur par les mains de Lathrop, suivant reçu d'octobre 1859. De fait ce reçu contient une imputation expresse sur le billet en question. Je crois qu'on devrait imputer

(1) Pothier, *Traité des Obligations*, No 567.

de même la somme de $130, prix d'une paire de bœufs vendus par William Brooks au Demandeur, laquelle vente me paraît être prouvée; 4° quant au billet de $400, du 16 avril 1850, il me semble qu'il ne doit pas être déduit d'après la condition mise par William Brooks lui-même, dans sa lettre au Demandeur du 16 avril 1859, dans laquelle Brooks dit," you can endorse when paid," ce que je comprends vouloir dire: " lorsque j'aurai payé le billet de $400, vous pourrez en porter le montant en acompte de mon premier billet." Or, ce billet n'a pas été payé par Brooks. Il est encore entre les mains du Demandeur. La condition n'a donc pas été accomplie.

Voici le jugement de la Cour d'Appel: " The court, seeing that the present action is founded upon a promissory note bearing date the 23rd day of November, 1855, by which Defendants in the court below, jointly and severally, promised to pay to the order of Lorenzo J. Kendall, one year after date $1232, for value received, with interest after due; seeing also that Kendall endorsed the note to Plaintiff long after it had reached maturity, and that the note was so endorsed by Kendall to Plaintiff, in order that the present action might be brought in the name of Plaintiff and not in the name of Kendall, Plaintiff being in fact a mere *prête-nom* for Kendal; doth, in consequence, declare that Plaintiff holds the note subject to all the matters of defence on the part of Defendants which could have been pleaded against the note, had it remained in the hands of Kendall, and the present action brought by him; and seeing that a part of the consideration to the extent of $132, for which the note was given, was interest, over and above interest at the rate of six *per centum per annum;* and that the said excessive interest could not have been recovered according to the laws in force when the promissory note was made; doth, in consequence, reject and dismiss the demand of Plaintiff, in so far as regards the sum of $132; and, seeing that the note for $400, bearing date the 16th day of April, 1859, made by William Brooks and Brooks brothers, payable to the order of Kendall, was received by him as collateral security and subject to the condition that the amount thereof should, when paid, be endorsed upon the note for $1232, now sued upon; and, seeing that the note for $400 hath not been paid, doth declare that Defendants are not now entitled to credit for the note for $400, and doth reject and dismiss their exception in so far as regards the same; seeing also that Defendants have proved that, excepting the note for $400, they made to Kendall all the payments alleged in their exceptions, and for which they take credit in and by the statement referred to by them, in the articulation of facts by them filed; and seeing that the note for $1232 now sued upon was the oldest in date of the notes held by Kendall, upon which De-

fendants were liable at the time the payments were made, doth declare that Defendants had a right to impute the said payments on account of the note as they have done; and, considering that the balance due by Defendants to Plaintiff, after deducting the excessive interest to the extent of $132, and after imputing the payments in manner as aforesaid, is $316 $\frac{34}{100}$ cy. only, and, therefore, that, in the judgment of the court below condemning Defendants to pay $641 71, there is error, doth, in consequence, reverse the judgment rendered by the Superior Court, at Sherbrooke, on the 19th day of November, 1861; and, proceeding to render the judgment which the court below ought to have rendered in the premises, doth condemn Defendants, jointly and severally, to pay to Plaintiff the sum of $318.34. with interest, &c. (12 *D. T. B. C.*, p. 461.)

SANBORN et BROOKS, pour les Appelants.

FELTON et GRIFFITH, pour l'Intimé.

SALES BY AN INSOLVENT DEBTOR.—FRAUD.

PRIVY COUNCIL, 19th July, 1862.

Present: Lord KINGSDOWN, Lord Justice Knight BRUCE and Lord Justice TURNER.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH OF LOWER CANADA.

ANDREW MACFARLANE *and* JOSEPHTE GÉRALDINE NORMANTINE DESJARDINS, Appellants, *and* FRANÇOIS LECLAIR *et* JEAN LECLAIR, Respondents.

In an action brought by creditors against their debtor, the Appellants were made parties as *tiers-saisis*, or garnishees, on the allegations that they had in their hands property of the debtor applicable to the payment of his debts. The property so alleged to be applicable, consisted of stock in trade, debts, and effects which the *tiers-saisis* became possessed of by virtue of a notarial deed of transfer, stated to be "without any warranty whatsoever," and a deed of partnership of even date; the former of which was made by a party who had been for some time in possession of the stock in trade, by virtue of an assignment from the original debtor, and the latter, the deed of partnership having been executed for the purpose of carrying on the business, and for valuable consideration. The Superior Court of Lower Canada held, that the party to whom the assignment of the property alleged to be applicable had been made, and from whom the Appellants, the *tiers-saisis*, derived title, was a necessary party to the suit, and dismissed the action against the Appellants. On appeal to the Court of Queen's Bench of Lower Canada, that court held Appellants liable and required a declaration on oath of the goods, etc., in their possession, formerly the property of the debtor proceeded against.—Held by the Judicial Committee, that upon the true construction of the Notarial instrument and the evidence in the case, the judgment could not be maintained, and the action against the Appellant dismissed with costs.

Respondents in this appeal were wholesale merchants at Montreal, Lower Canada, and, on the 16th January, 1856, were creditors of John Mark Crank Delesderniers, who was a storekeeper and retail dealer, and kept a shop or store at Sainte-Scholastique, Lower-Canada, to the amount of £417 0s. 8d. currency (equivalent to £342 15s. 4d. sterling) for goods supplied by them to him in the way of his business a portion of which sum was covered by promissory notes made by Defendant and payable to Respondents in respect of such goods. Appellants carried on business in partnership at Sainte-Scholastique at storekeepers and retail dealers. To recover the above amount Respondents commenced an action against Delesderniers in the Superior Court of Montreal, and by their declaration, dated the 10th of January, 1856, claimed such amount as due to them upon the promissory notes, and also for goods sold. They claimed also a writ of *saisie-arrêt*, or attachment before judgment, against the goods of Delesderniers, which they alleged were in possession of Appellants, and also of one Horace Nelson Delesderniers, brother to the Defendant, whom they prayed might be summoned as *tiers-saisis*, or garnishees by a writ of *saisie-arrêt*. The writ of *saisie-arrêt* was issued and executed on the 11th February, 1856, the Defendant did not plead to the action, but, on the 12th of May, 1856, suffered judgment by default, and, on the 28th of June, was condemned by the Superior Court to pay the sum sued for by Respondents. H. N. Delesderniers, one of the *tiers-saisis*, filed his declaration, alleging that he claimed no interest in the property in question. The other two garnishees, Appellants, contested the claim of Respondents, and on the 11th February, 1856, respectively filed their declarations on oath denying that they had any property of Respondents in their possession. On the 5th of July, 1856, Respondents filed their contestation of Appellant's declaration, alleging, amongst other things, that the Defendant had been carrying on a considerable business at Sainte-Scholastique for more than fifteen months, up to the month of December, 1855, under the name of J. M. C. Delesderniers, as well by himself as by his brother, H. N. Delesderniers, acting as his agent. That during that time Respondents had sold and delivered to him many goods, for the price of which there was then owing to them the sum of £417 0s. 8d., currency for which they had obtained judgment against Defendant; that about the month of November, 1855, Appellants took possession of the house, or store, in which the Defendant had up to that time done business, and of his stock in trade, books of account and credits, in fraud of Defendant's creditors, and in particular of Respondents, and were still in possession

thereof at the date and execution of the writ of *saisie-arrêt;* that at the time of the service of the writ, and for more than eighteen months before, Defendant had no other property in Lower Canada wherewith to secure to his creditors the payment of their claims, and was insolvent, and that the taking possession of their stock in trade by Appellants was a collusive proceeding between Appellants and Defendant, and Respondents prayed that the writ of *saisie-arrêt* might be declared valid, and that Appellants might be declared to have had in their hands at the time of the service thereof goods of Defendant sufficient to satisfy the claim of Respondents and might be condemned to pay to Respondents the sum of £417 0s. 8d., with interest upon the amounts of the promissory notes and costs. On the 15th of October, 1856, Appellants filed their answer to the contestation, maintaining their respective declaration to be true, and alleging, amongst other things, that Defendant never did business at Sainte-Scholastique, nor lived there, after the 1st of May, 1855; and that since that date he had lived and done business at Vankleek Hill, in Upper Canada; that since that date Respondents had not sent any goods to Defendant; that Respondent knew that one Melchior Prevost did business at Sainte-Scholastique, in the store alleged by Respondents to have been the store of Defendant during the years 1853, 1854 and 1855, up to the 6th of November in the latter year and that Respondents had made sale to Prevost, for the store. That, on the 6th of November, 1855, Prevost, by a bill of sale formally executed, transferred to Macfarlane, one of Appellants, the whole stock in trade, debts, and books of account, on condition of his paying certain debts Prevost had contracted in his business, amounting to £1,642 14s. 5½d., and the rent of the store, and that Macfarlane took possession of the store and of all that was so sold to him. That Macfarlane had never brought or received any goods or effects from Defendant, or from any third person, with the knowledge that they belonged to Defendant; that on the same 6th of November, Macfarlane entered into partnership, by a deed of that date, with Appellant, Josephte G. Normantine Desjardins, wife *(séparée quant aux biens)* of H. N. Delesderniers, under the name of Delesderniers & Co., and began to do business with such stock in trade at the store. That Mcfarlane acquired the stock in trade in good faith and without fraud or collusion with Defendant. On the 21st of October, 1856, Respondents filed their replication, denying the material allegations of Appellants, and alleging facts tending to prove the fraud and nullity of the alleged assignment from Prevost to Appellants. Respondents also filed a special answer to the answer of Appellants, to which Appellants replied. No

demurrer or objection in law was filed by Appellants. The issues in fact being joined, the parties proceeded to enquête, when evidence was produced on both sides. It was proved that, before September, 1853, H. N. Delesderniers carried on business at the store at Saint-Scholastique, and that from that time till about June, 1854, the same business was carried on at the same place in the name of Prevost, H. N. Delesderniers, continued, however, to reside there and to manage business as clerk to Prevost. On the part of Respondents, several witnesses proved that about June, 1854, the business changed hands, and instead of being carried on by and in the name of Prevost, was carried on by and in the name of Defendant. That after that time, Respondents dealings and accounts were carried on and made with Defendant, either personnally or through his hrother, H. N. Delesderniers, who acted as his agent, and that after that time credit was given and goods were supplied by them to Defendant, and no longer to Prevost. It was also proved that in the spring 1855, Defendant ceased to reside at Sainte-Scholastique, and removed to Vankleek Hill where he began business, and opened a store. Prevost, the assignor of the bill of sale, was called as a witness for Respondents. He slated that he was not interested in the event of the suit; that he had been told by H. N. Delesderniers that, amongst the goods transferred by the bill of sale to Macfarlane were certain goods left by Defendant at the store, and for which payment was due to Respondents. Prevost was cross examined for Appellants, who reserved to themselves the right of calling him as a witness in their behalf, but they did not call him. To uphold the validity of the bill of sale, Appellants examined witnesses to prove that Defendant had not carried on business in his own name at Sainte-Scholastique, and that, even if he had done so, he ceased to do so immediately upon going to Vankleek Hill. Appellants also produced accounts current and invoices of goods furnished by merchants at Montreal to the store at Sainte-Scholastique during the years 1853, 1854, and 1855, with a view to show that Prevost was debited for such goods. The notarial act of the bill of sale and the deed of partnership of the 6th of November, 1855, were put in and proved, and were in the following terms: " On this day, the 6th of November, 1855, in the afternoon, before us, the undersigned notaries public, duly commissioned and sworn in and for that part of the Province of Canada heretofore constituting the Province of Lower Canada residing in the district of Montreal, in the Province of Canada foresaid; personnally came and appeared Melchior Prevost, of St. Jérôme, in the district of Montreal, notary public & merchant, who acknowledged and confessed to have bargained, sold, assigned, transferred and

made over and he hereby doth bargain, sell, assign, transfer and make over, without any warranty whatsoever, to Andrew Macfarlane, of the city of Montreal, in the District of Montreal, merchant, present and accepting, the whole of the stock in trade, animals, and movable property generally, mentioned and detailed in the Schedule marked A. hereunto annexed, identified by the signatures of the said parties, and us the said Notaries, and all the debts also set forth in such schedule, and all bills or notes, accounts, and books of account on which the same are founded, or any wise connected with such debts, and generally all property referred to in such schedule, and likewise all the right, title and interest of the said M. Prevost in and to certain property, leased by him from one Horace Nelson Delesderniers, under and by virtue of two certain deeds of lease, the one executed on the 15th of September, 1853, in the presence of Lamarche, Notary public, and witnesses, and the other executed on the 28th of October, 1853, in the presence of said Lamarche and colleague, notaries public, and in and to all right, title, and interest of him the said M. Prevost derived or derivable from said two deeds of lease; the said A. Macfarlane recognizing to have visited the herein stocks, animals, and debts, and also recognizes to have the whole in his possession, and quits the said M. Prevost. The present deed is executed in consideration that the said A. Macfarlane shall, and he hereby agrees to pay in discharge of the said M. Prevost the following debts due in respect of the business he carried on in said premises to the following parties, to wit: Hudon & Quevillon, merchants of the city of Montreal, the sum of £1,379 13s. 9d.; Haldimand & Brothers, merchants of the said city of Montreal the sum of £119 11s. 6d.; Boivin & Lemay, merchants of the said city of Montreal, the sum of £30; F. & J. Leclaire, merchants of the said city of Montreal, the sum of £48 13s.; Lazure & Frère, merchants of the said city of Montreal, the sum of £35 7s. 3d.; Félix Lafleur, Clerk of the parish of Sainte-Scholastique, the sum of £3 5s. 9½d.; A. Macfarlane, the purchaser, the sum of £26 3s. 2d.; currency, all the same sums making the sum of £1,642 14s. 5½d.; which the said A. Macfarlane promises, and bound himself, to pay to the said creditors as if he was the personal debtor of the said sum and in a manner that the said M. Prevost will not be troubled in any manner whatsoever; and further, in consideration that the said A. Macfarlane shall and he hereby agrees to pay in discharge of the said M. Prevost, any rent that may ever become due or be claimed or demanded under said two deeds of lease. Thus done and passed at the parish of Sainte-Scholastique, at the residence of H. N. Delesderniers, under member of 5,351,

the day, month, and year above written, and the parties have signed with us Notaries, after the reading of these presents, according to law. (Signed) Malchior Prevost, Andrew Macfarlane, L. E. Globensky, notary, &c." The deed of partnership was in these terms: "On this day, the 6th of November, 1855, in the afternoon, before us the undersigned notaries public, duly commissioned and sworn in and for that part of the Province of Canada heretofore constituting the Province of Lower Canada, residing in the District of Montreal, in the Province of Canada aforesaid; personally came and appeared Andrew Macfarlane, of the city of Montreal, in the district of Montreal Merchant of the first part, and Josephte Normantine Geraldine Desjardins, of Ste-Scholastique, in the district of Montreal aforesaid, trader, *Marchande publique*, and wife of Horatio Nelson Delesderniers, of Ste-Scholastique aforesaid gentleman, and duly separated from her said husband as to property by a judgment of the Superior Court of Lower Canada, sitting in and for the said District of Montreal, and the said H. N. Delesderniers, for the purpose of authorizing his said wife, as he hereby specially does, for all the purposes hereof, of the second part, who declared unto us the said Notaries that they have covenanted and agreed, and they hereby do covenant and agree, as follows: The said A. Macfarlane and J. N. G. Desjardins shall carry on the trade and business of country Merchants in copartnership at Ste-Scholastique aforesaid under the name or firm of Delesderniers & Co. The said copartnership shall subsist for five years from the date hereof, and unless either party notify the other to the contrary at least three months before the expiration of such five years, the copartnership shall be continued for another year, and so on every succeeding year, unless dissolved, as it may be at the end of any one of such years, by a notice to that effect by either party to the other at least three months before the expiration of any such year. Neither of the said copartners shall have power to sign the copartnership signature or other-wise bind the said firm on any bill, draft, note or cheque unless with the consent in writing of the other copartner. The said A. Macfarlane shall have the exclusive right of purchasing goods for the said copartnership, and shall have liberty to furnish the said copartnership with goods from his own store in Montreal, such goods to be taken by the copartnership at the lowest cash prices, and to be paid for with interest, after three months from the delivery of the goods. The said A Macfarlane shall have the exclusive nomination and appointment of the book-keeper. All monies collected shall be remitted to the said A. Macfarlane on Saturday of every week. A balance-sheet of the affairs of the said copartnership shall be made out monthly and forwarded to the said A. Macfar-

lane. Stock shall be taken, and the books of the concern shall be balanced, yearly, on the 10th of April. The said H. N. Delesdernisrs shall be employed by the said copartnership as a salesman, at a salary of £25 currency per annum payable quarterly. The said J. N. G. Desjardins shall in no wise be concerned or interested in the business of A. Macfarlane & Co., at Montreal, or in any business whatsoever of the said A. Macfarlane; the said copartnership being limited exclusively to the business to be carried on by the said partners together at Ste-Scholastique aforesaid. The said J. N. G. Desjardins shall be allowed £30 currency for each clerk who shall be boarded by her, and shall not draw out of the funds of the concern for her own private use more than £100 currency per annum. The said A. Macfarlane having advanced to the said copartnership, goods, money, and debts to the extent of £4, 061 14s. 5½d. currency, that amount shall stand as a debt due by the copartnership to him, and shall bear interest from this date at the rate of 6 per cent per annum, which sum and interest shall be first paid to the said A. Macfarlane before any profits shall be struck. The profits of the concern, if any shall be divided equally between the said copartners, at the dissolution of the said copartnership. Thus done and passed at the Parish of Ste-Scholastique, at the residence of H. N. Delesderniers, under number 5352, the day, month, and year above written, and the parties have signed with us Notaries after the reading of these presents according to law. (Signed) Andrew Macfarlane, J. N. G. Desjardins, H. N. Delesderniers, M. Prévost, N. P., Augustus Mackay, N. P." The Superior Court of Lower Canada, on the 18th of October, 1858, delivered judgment as follows: "Considering that Plaintiffs cannot obtain the conclusions of their contestation in this cause filed, as thereby, they pray, unless the deed of sale and transfer and executed by Melchior Prevost in favour of Andrew Macfarlane, one of the *Tiers Saisis* on the 6th of November, 1855, in the answers of the *Tiers-Saisis* to the said contestation mentioned, and in this cause produced and filed of record, be declared null and of no effect with respect to Plaintiffs, and having been made by fraud and collusion between Melchior Prevost, Defendant, and the *Tiers-Saisis*, as Plaintiffs, in and by their answers to the answers of the *Tiers-Saisis* have prayed; and considering that the Court now here ought not, upon the evidence of the record, under the pleadings, issues had and joined in this cause, so to declare the deed of sale and transfer null and of no offect in the absence of Melchior Prevost, the vendor therein mentioned; and that upon the evidence, and by law, Melchior Prevost, must be impleaded and made a party in any action or proceeding for causing the deed of sale and transfer to be so declared null and of no effect,—doth dismiss the contestation

with costs." From this judgment Plaintiffs (present Respondents) appealed to the Court of Queen's Bench of Lower Canada. The appeal was heard by the Court of Queen's Bench of Lower Canada, before the Chief-Justice, Sir LOUIS HYPOLITE LAFONTAINE, and the Puisne Judges, AYLWIN, DUVAL, MEREDITH and MONDELET. The judges differed in opinion. The Chief-Justice and the Judges, AYLWIN and MONDELET, were in favour of the appeal. The other Judges, DUVAL and MEREDITH, dissented from the majority. On the 7th of December, 1860, the Court pronounced judgment on the appeal. The judgment (omitting the formal parts) was as follows: "It is adjudged that the judgment rendered by the Superior Court be reversed; and it is ordered that, within fifteen days from the service of the present judgment upon them, Respondents (present Appellants) do appear before the Court below, at Montreal, to make a declaration *de novo*, upon oath, specifically and in detail, of all such goods, wares, and merchandise enumerated in the schedule annexed to the deed, as were in their hands, power and custody in the house, store, and building of Horace Nelson Delesderniers, and remaining unsold on the 16th day of January, 1856, the day of the service upon them of the process of attachment in this cause issued, and also of all such sums of money as they may have received from the sale of any of the said goods in the schedule specified, previously to the attachment, and from all or any of the debtors mentioned in the schedule, in order that, upon such further declaration of the garnishees, such other and further proceedings may be had, as to law and justice may appertain in the premises; and it is further adjudged that Respondents (present Appellants) do pay to Appellants (present Respondents) the costs by them incurred in this behalf, as well in the Court below as in the Court here; and, lastly, it is ordered that the record be remitted." The present Appellants applied for leave to appeal against this judgment to Her Majesty in Privy Council, the leave to appeal was granted, after some discussion with reference to appealable value; and the appeal so granted was sought upon the same grounds to be dismissed; but the decision of the Court of Queen's Bench, admitting the appeal, was, in substance, affirmed by Her Majesty in Privy Council. (1)

Sir HUGH CAIRNS, Q. C., and Mr WICKENS, for the Appellants: The sale by Prevost to Appellant, Macfarlane, was a *bona fide* sale made for valuable consideration, and he acquired thereby an indefeasible title to the property against the creditors of John Mark Crank Delesderniers. There was no proof, whatever, and no attempt to prove, that when Macfarlane

(1) See case reported on this point, 10 R. J. R. Q., p. 127.

purchased from Prevost he was acting fraudulently or collusively, or had any knowledge or notice whatever of any supposed infirmity in Prevost's title, or of anything tending to throw a doubt on it. There was in truth no such infirmity. The sale was effected by a notarial instrument, properly and formally executed and attested. It was proved that, at the date of sale, Prevost was carrying on the business at Sainte-Scholastique; he had at the lowest the reputed ownership and that, according to the old french law prevailing in Lower Canada, in the absence of fraud, is sufficient. Toullier, *Le Droit Civil Français*, tome IX., No. 171; Troplong, *Le droit civil, de la vente*, tome V., ch. 4, secs. 472-474. The words contained in the deed of sale, " without any warranty whatsoever," raised no presumption of fraud, as, according to the french law, they would not exclude Prevost's warranty, if that were required. Pothier. *Traité du contrat de vente*, tome I., No. 184; Bourjon, *Le droit commun de la France*, tome II, tit. 8, s. 4, par. 18, (Edit. 1770), *Des exécutions*, p. 495; Bouteiller, B. I, tit. 8, sec. 4. A grantee for value most have knowledge of fraud, *Voet on the Pandects*, B, XLII, tit. 8; Bédarride, *Traité du Dol*, etc., tome III, p. 194, sec. 2, p. 208 (Edit., Paris, 1852). The deed stands untill it is set aside by *action révocatoire*, Bédarride, tome I, p. 267. Even supposing there were grounds for proceeding to annul this sale, none such could be taken in the absence of Prevost. He is a necessary party, and cannot be charged with fraud and the sale made by him rescinded on such ground, without bringing him formally before the court. The decision of the Queen's Bench cannot be supported either upon the law or facts of the case.

The solicitor-general (Sir R. Palmer), and Mr. Charles E. Pollock, for Respondent. This appeal is premature. The judgment of the Court of Queen's Bench was not final upon the merits, it was left upon in the further progress of the cause to deal with the property as justice might require. Respondent were entitled to judgment against Appellant as *tiers-saisis*, or garnishees, if they were proved to be in possession of goods of John Delesderniers sufficient to satisfy the Respondents' claim. At all events it must stand to the extent of the goods of John Delesderniers, which have been mixed with those of Prevost. That is the law of the colony, and is pleaded and admitted on all hands. Now, the Appellants' title is derived entirely from the notarial deed of sale, by Melchior Prevost, who had in fact no title to the property said to be transferred, which belonged to John Delesderniers, as was known to the Appellant, Macfarlane, that deed therefore, we contend, is upon the face of it collusive and fraudulent. It purports to be " without any warranty whatsoever "; the consideration stated in it is colourable. At

the utmost, it could only operate as a transfer of the business. There was no valid consideration for the debts specified in the schedule. It was proved moreover by the witnesses examined by Respondents that Prevost never had any title to the goods said to be assigned by it. It is contended, that no decree could be made without Prevost being a party on the record, but he was before the court being called by Respondents as a witness; and, as he stated he has no interest in the action, it was not requisite to make him a party on the record. If he was a necessary party, Appellant, Macfarlane, whose vendor he was, ought to have brought him before the Court; and if the objection as to his absence was worth any thing, it ought to have been made by demurrer, and was too late to be urged at the hearing. The judgment of the Superior Court ought not to have ordered Prevost to be made a party, as that point was concluded by issue being joined, and the only issue for that court to try was one of fact. Best, *on Evidence*, sec III, 3rd. edit.; *Beavan* vs. *Seed*. (1)

Judgment was delivered by the the Lord Justice Turner: This is an appeal from a judgment or decree of the Court of Queen's Bench of Lower Canada, reversing a judgment or decree of the Superior Court of the same province. The proceedings out of which this appeal arises had their commencement in an action brought by Respondents against John Delesderniers, for the recovery of some debts due from him to them, and to which action Appellants were made parties as *tiers-saisis* or garnishees, upon allegations that they had in their hands property of John Delesderniers, applicable to the payment of his debts. The property thus alleged to belong to John Delesderniers, and to be in the hands of Appellants, consisted of the stock in trade, debts and effects of, or belonging to, a trade or business carried on at a place called St. Scholastique, a few miles distant from Montreal; and Appellants claimed to be intitled to this property under a notarial instrument dated the 6th November, 1855, by which it was purported to be assigned by Melchior Prevost to Appellant, Andrew Macfarlane; and under another notarial instrument of the same date, by which Appellant, Andrew Macfarlane, transferred it to a partnership formed by that instrument, between him and the other Appellant, Josephte Normantine Geraldine Delesderniers, the wife of one Horace Nelson Delesderniers, a brother of John Delesderniers, and who was separated from her husband *quant aux biens*. The Respondents, however, insist that Melchior Prevost had no title to the property thus purported to have been assigned and trans-

(1) 3 Lower Can. Rep. 446.

ferred, but that it belonged, and was known by the Appellant, Andrew Macfarlane, to belong, to John Delesderniers. It will be necessary, presently, to refer more particularly to these notarial instruments, but what has been stated is sufficient to show the nature of the question in dispute between the parties to this litigation. The Respondents having obtained, in the action brought by them, a judgment by default against John Delesderniers, went on with the action against Appellants, the *tiers-saisis* or garnishees ; and a mass of evidence was adduced on both sides as to the title to the property in question, the evidence relating mainly to the conduct of the business, with a view to show, on the one side, that it belonged to John Delesderniers ; and, on the other, that it belonged to Melchior Prevost. The cause was heard in the Superior Court, in the month of September, 1858, and that court by its judgment or decree, bearing date the 18th October, 1858, declared its opinion to be that the sale to Appellant, Andrew Macfaclane, could not be set aside in the absence of Melchior Prevost, but that he must be made a party to any action or proceeding for setting aside the sale, and, accordingly, the court dismissed the action as against the Appellants, with costs. The Respondents appealed to the Court of Queen's Bench from this judgment or decree. That court differed from the Superior Court on the question of form on which it had decided, and entered fully into the merits of the case, and by its judgment or decree, bearing date the 7th December, 1860, reversed the decree or sentence of the Superior Court, and ordered that Appellants, who were Repondents in that Court, should make a declaration *de novo* upon oath, of all such goods, wares, and merchandizes mentioned in the shedule to the deed of sale by Melchior Prevost to the Appellant, Andrew Macfarlane, as were in their hands, power and custody, and remaining unsold on the 16th January, 1856, the day of the service upon them of the process of attachment in the cause ; and also of all such sums of money as they had received from the sale of any of the said goods previously to the said attachment, and from all or any of the debtors mentioned in the said schedule, in order that upon such further declaration of Appellants such further proceedings might be had as to law and justice might appertain ; and further ordered that Appellants, Respondents in that court, should pay to Respondents, Appellants in that court, the costs both in the Superior Court and in that court. The judges of the Court of Queen's Bench, however, were divided in opinion upon the case, three of them being in favour of the decree pronounced by the court, and the other two being of opinion that the action ought, as against the

Appellants, to be dismissed. The appeal before us is from the above mentioned judgment or decree of the Court of Queen's Bench. It was, in the first place, insisted, on the part of the Respondents, in opposition to this appeal, that it was premature; that the judgment of the Court of Queen's Bench was not final and conclusive, but left it open to the court, in the further progress of the cause, to deal with the property in question as justice might require; but their lordships are satisfied that this judgment or decree subjects the property in question finally and conclusively, to the payment not only of the debts due to Respondents from John Delesderniers, but of other debts due from him. This was the conclusion at which their lordships arrived upon the occasion of the petition presented by Respondents to dismiss this appeal as incompetent, and the further consideration which they have given to the case confirms them in the opinion which they then expressed. (1) They are of opinion. therefore, that the preliminary objection insisted upon by Respodents cannot be maintained. It remains, then, to dispose of the case either upon the point of form which prevailed in the Superior Court, or upon the merits, and their lordships think it better to dispose of it upon the merits. They therefore give no opinion upon the point of form. In dealing with the case upon the merits it will be convenient, in the first place, to consider the operation and effect of the notarial instruments of the 6th of November, 1855; looking at them, first, as they stand independently of the other evidence in the cause; and secondly, as they may be affected by that other evidence. By the first of these notarial instruments, Melchior Prevost purports to assign, without any warranty whatever, to the Appelant, Andrew Macfarlane, the whole of the stock in trade, animals, and moveable property generally, mentioned and detailed in the schedule annexed to the instrument, and all the debts, also set forth in such schedule; and all bills or notes, accounts and books of account on which the same are founded. or any wise connected with such debts; and generally all property referred to in such schedule; and likewise all the right, title, and interest of the said Melchior Prevost in and to certain property leased by him from one Horace Nelson Delesderniers, under and by virtue of two certain deeds of lease, executed the one on the 15th September, 1853, and the other on the 28th October, 1853, and in and to all right, title, and interest of him the the said Melchior Prevost, derived or derivable from the said two deeds of lease, in consideration that the Appellant, Andrew Macfarlane, shall, and he thereby agreed to pay in discharge of the said Melchior Prevost certain

(1) Vide 10 R. J. R. Q., p. 127.

debts due in respect of the business he carried on in the said premises, which debts are enumerated in the instrument, and mentioned to amount in the whole to the sum of £1,642 14s 5½d, and which debts the Appellant, Andrew Macfarlane, promised and bound himself to pay to the said creditors as if he was the personal debtor of the said sum, and in a manner that the said Melchior Prevost would not be troubled in any way whatsoever; and further in consideration that the Appellant, Andrew Macfarlane, should, and he thereby agreed to pay, in discharge of the said Melchior Prevost, any rent that might ever become due, or be claimed or demanded under the said two deeds of lease. Appended to this notarial instrument there is a schedule, setting forth in great detail the particulars of the stock in trade and debts belonging to the business at St. Scholastique, and purporting to be assigned by the instrument; and by this schedule it appears that, according to the prices set upon the goods, and the amounts at which the debts were taken, the total value of the property assigned was £4,061 14*s*. 5½*d*., leaving, after deducting the £1,612 14*s*. 7½*d*., to be paid by Melchior Prevost, a clear balance of £2,448 19*s*. 10*d*. By the other of these notarial instruments, the Appellants agreed to carry on the trade or business of country merchants in partnership at St. Scholastique, for the term of five years, and afterwards from year to year, unless and until notice of dissolution should be given, as therein mentioned. Neither of the partners was to have power to bind the firm by any bill, note, or cheque, without the consent of the other. The Appellant, Andrew Macfarlane, was to have the exclusive right of purchasing goods for the partnership, and to have liberty to furnish the co-partnership with goods from his own store, the goods to be taken by the partnership at the lowest cash prices, and paid for with interest three months after delivery. He was also to have the exclusive nomination of the bookkeeper, and all moneys collected were to be remitted to him every week. A balance-sheet of the affairs of the partnership was to be made out monthly and forwarded to him, and stock was to be taken and the books balanced yearly. Horace Nelson Delesderniers was to be employed by the partnership as salesman, at a salary of £25 per annum. The Appellant, Josephte Normantine Geraldine Delesderniers, was to be allowed £30 annually for each clerk boarded by her, and was not to draw out of the funds of the concern for her own private use more than £100 a year; and lastly, it was agreed that the Appellant, Andrew Macfarlane, having advanced to the partnership goods, money, and debts, to the extent of £4,061 14*s*. 5½*d*., that amount should stand as a debt due by the co-partnership to him, and should bear

interest at 6 per cent; that that sum and interest should be first paid to the Appellant, Andrew Macfarlane, before any profits were struck, and that the profits of the concern, if any, should be divided equally between the partners at the dissolution of the partnership. These notarial instruments were much commented upon on the part of Respondents in the course of the argument before us, Respondents contending that these instruments evidenced that the sale purported to be made by the first of the instruments to Appellant, Andrew Macfarlane, was not and could not be a *bona fide* sale. It was insisted, on their part, that the first of these instruments operated and was meant to operate only as a transfer of the business to the Appellant, Andrew Macfarlane, subject to the payment by him of the debts which were due from it, and the Respondents relied upon the sale being without warranty, upon the value of the property purported to be assigned, as specified in the schedule, when compared with the amount of the debts which Appellant, Andrew Macfarlane, undertook to pay upon the property purported to be assigned having been carried by Appellant, Andrew Macfarlane, into the partnership between Appellants, as being of the value mentioned in the schedule and upon the contemporaneous formation of the partnership between the Appellants, and the connection with that partnership of Horace Nelson Delesderniers, the brother of John Delesderniers, and the husband of Appellant, Josephte Normantine Geraldine Delesderniers. These, no doubt, are circumstances calculated to excite suspicion; but, on the other hand, the authorities which were referred to on the part of Appellants, and which were not controverted on the part of Respondents, seem to prove that, notwithstanding the provision that the sale was without warranty, the vendor would be liable to the purchaser if he sold with knowledge that he had no title; and whatever the law of Lower Canada upon this point may be, on which their Lordships give no opinion, they see no reason to suppose that, because the sale was without warranty, it was therefore fraudulent. It would, they think, be going too far to assume that, because a vendor refuses to warrant, it must therefore be taken that the purchaser knew that there was fraud or that there was no title, although, of course, in such a case a purchaser must take, subject to the risk of a title being proved against him. Then as to the first of these instruments operating only as such a transfer of the business as contended for by the Respondents, and as to the value of the property transferred, it is true that upon the face of the instrument its operation would appear to be such as the Respondents allege, and the value such as represented by the schedule; but, on the other

hand, having regard to the nature of this business, it is impossible to suppose that all the goods enumerated in the schedule could be sold at the prices at which they were valued, or that all the debts which are mentioned in the schedule were good debts and could be recovered without loss: and the Respondents have given no evidence either asto the value of the goods or the character of the debts. And as to the formation of the partnership between the Appellants and the connection of Horace Nelson Delesderniers with the business to be carried on by it, it was quite competent to the Appellants to come to any agreement which they might think fit as to the terms of the partnership between them; and the other facts relied on by the Respondents are sufficiently accounted for by the circumstances to which we are about to refer, evidencing as they do the importance of the services of Horace Nelson Delesderniers being retained in the business to be carried on. It may be well to add on this part of the case, that it is difficult to suppose that if any fraud had been in contemplation, these notarial instruments would have been prepared in the form in which they are found. Looking, therefore, to these instruments without reference to the other facts which have been proved in the cause their Lordships have no hesitation in saying that the instruments, although they may not be altogether free from suspicion, do not warrant any judicial conclusion unfavourable to the case of the Appellants. It becomes necessary then to examine the other evidence in the cause, and to consider to whom, according to that evidence, the property in question ought to be held to have belonged; but on this part of the case it will be sufficient for their Lordships to state the conclusion, at which they have arrived, without entering into the details of the evidence which ther Lordships have fully weighed and considered. It will be convenient, however, before, stating those conclusions, to point out the position of the different persons whose acts and conduct it is necessary to consider. Melchior Prevost was, it appears, in and prior to the month of September, 1853, and has ever since been a Notary carrying on business at St. Jerome, a place distant about ten or twelve miles from Ste. Scholastique. Horace Nelson Delesderniers, was up to the month of September, 1853, the undoubted owner of the trade or business in question carrying on that trade or business at Ste. Scholastique. John Delesderniers carried on some business at St. Jerome, for some time bofore and until about the spring of the year 1854, when he sold off his stock at that place, and removed to Ste. Scholastique, where he remained, living, as it would appear, at least during some part at the time, with his

brother Horace Nelson Delesderniers, until some time about the spring of the year 1855, when he removed to a place called Vankleek. (about fifty miles distant) and established himself in business at that place. The Appellant, Andrew Macfarlane, was previous to the month of September, 1853, and has ever since been, a general merchant or trader at Montreal. Such having been the position of these several persons we find that in the month of September, 1853, this business passed into the hands of Melchior Prevost, who then began to carry it on, Horace Nelson Delesderniers acting as his agent in the conduct of it. It was suggested on the part of the Respondents in the course of the argument on their part, that there never was any *bona fide* transfer of the business by Horace Nelson Delesderniers to Melchior Prevost, but that Horace Nelson Delesderniers having become involved in difficulties, Melchior Prevost lent him the use of his name for the purpose of protecting the property embarked in the business from the demands of his creditors. Their Lordships, however, can find nothing in the evidence which can justify this conclusion. It was stated at the bar at the part of the Appellants, and not denied on the part of the Respondents, that it is not unusual in Canada for notaries to carry on a business of this description, and the evidence furnishes no ground to suppose that Melchior Prevost's taking up this business was unusual or extraordinary. Leases were granted to Melchior Prevost of the premises on which the business was carried on, and it appears from the evidence that, in and very soon after September, 1853, he laid out large sums of money in the purchase of stock for the business. Their lordships, therefore, feel no doubt that, in September, 1853, Melchior Prevost became the owner of this business, and of the stock and effects belonging to it, and they think it equally clear that he continued in such ownership down to the spring of the year 1854, conducting the business by Horace Nelson Delesderniers as his agent. This is an important point in the case, for it being established that Melchior Prevost was at one time the owner of the business, the onus of proving that he ceased to be so must rest upon the Respondents. The Respondents have not, in their lordships' opinion, satisfied the obligation thus resting on them. It is true that they have proved that, from the spring of the year 1854 to the spring of the 1855 John Delesderniers acted and interfered in this business to a great extent, and if the case had rested solely upon his acts and interference, it would, perhaps, have been right to have concluded that he had become the purchaser of the business; but the Respondents have called as their witnesses Melchior Prevost and Horace Nelson Delesderniers, both of whom must have known whether John

Delesderniers had purchased the business or not, and the testimony of both those witnesses appears to their lordships to show that he never did, in fact, become the purchaser of it. There is no proof on the part of the Respondent that he paid any consideration for the alleged purchase, and he could not have become the purchaser upon the terms of paying the debts then due from the business, as it appears by the evidence that Melchior Prevost, after the date of the supposed purchase, continued to make payments on account of those debts. Again, there is no proof, on the part of the Respondents, of any assignment having been made to John Delesderniers of the leasehold premises on which the business was carried on, and he can hardly be supposed to to have become the purchaser of the business without taking an assignment of those premises. But what has seemed to their Lordships yet more important in its bearing upon this question, is the fact which, in their Lordship's opinion, is conclusively established by the evidence, that from the time when John Delesderniers went to Vankleek, the business, if in fact it had ever been abandonned by Melchior Prevost, was resumed by him, and was continued to be carried on by him until the sale to the Appellant, Andrew Macfarlane, without, so far as appears, any interference on the part of John Delesderniers, who appears, by the evidence, to have been present when the sale to the Appellant, Andrew Macfarlane, took place. Their Lordships, therefore, upon the whole of this case, are satisfied that whatever may have been the dealings between John Delesderniers and Melchior Prevost between the spring of the year 1854 and the spring of the year 1855. there never was any complete sale to John Delesderniers of this business, or the stock, debts, and effects which belonged to it; and further, they thing that if there was, in fact, any such sale, there is no sufficient proof of such notice to the Appellant, Andrew Macfarlane, as could entitle the Respondents to follow the goods into his hands. Their lordships, therefore, are of opinion that the jugdment or decree of the Court of Queen's Bench cannot be maintained. It was urged, on the part of Respondents, that, at all events, it ought to be maintained to the extent of any goods of John Delesderniers which may have been intermixed with the goods of Melchior Prevost, but it does not appear by the evidence, so far as their lordships can find, that any of such goods were remaining at the time of the purchase by Appellant Andrew Macfarlane, and this view of the case, if well founded as to the facts, would be met by the point as to the absence of notice, which has last been adverted to. Their lordships, therefore, will humbly recommend Her Majesty to reverse the judgment or decree complained of by this appeal, and to direct that the action or suit brought by Respondents

against Appellants be dismissed as against them with costs, both in the Superior Court, in the Court of Queen's Bench, and in this court. (12 *D. T. B. C.*, p. 374, et 1 Moores', *P. C., Rep., N. S.*. p. 1.)

ACTION EN LICITATION ET PARTAGE.—LITISPENDANCE.

SUPERIOR COURT, Quebec, 4th October 1862.

Before STUART, Justice.

BOSWELL, Plaintiff, *vs.* LLOYD, *et al.*, Defendants.

Jugé: 1° Qu'une action en licitation contient toujours une demande en partage.

2° Que, dans les actions en licitation, les parties Demanderesse et Défenderesse se trouvent dans la même position, vis-à-vis l'une de l'autre, chaque partie étant Demanderesse et Défenderesse.

3° Que, dans telles actions, la cause d'action est la co-propriété par indivis, et non l'indivisibilité supposée de la propriété elle-même.

4° Que, dans l'espèce, litispendance existait, et avait été dûment plaidée, quoique l'action concluait simplement à une vente par licitation, tandis que l'action invoquée comme opérant la litispendance concluait à un partage et à une licitation.

5° Que la litispendance doit compter depuis la signification du writ, et non du jour du rapport.

This was an action brought by Plaintiff against Defendants for the *licitation* of an immoveable property, held *par indivis* by the parties. The Plaintiff alleged in his declaration that the property in question was indivisible, and could not be conveniently administered between the parties; he, therefore, concluded that it should be viewed and examined by *experts* to ascertain its value and whether or not it was divisible, to the end that if it should appear from the report of the *experts* that partition could not be conveniently made, then that the property should be sold by licitation. To this action, Defendant Lloyd pleaded, by temporary exception," that Plaintiff could not succeed in his action because, at the time of its institution and at the time of the filing of the plea there was pending before the court an action for the *licitation* of the premises in question in the cause between the same persons as those engaged in the present suit." In December, 1861, Boswell, the Plaintiff, and McCallum one of the Defendants, became the joint *adjudicataires*, at a judicial sale, of one undivided half of the premises in question. A few days afterwards, Lloyd, the Present Defendant, instituted an action against Boswell, the present Plaintiff, and McCallum one of the Defendants, for the division or *licitation* of the premises in question, of which he, Lloyd, alleged himself the co-proprietor, and, furt-

her, set forth, in his action, that the property was held *par indivis*, by himself as proprietor of one undivided half, and by Boswell and McCallum as proprietors of the other undivided half; he, therefore, concluded that *experts* should be named to view and examine the premises to ascertain whether or not they could be divided, to the end that, if divisible, they should be divided, and if not, that they should be sold by *licitation* in the usual and accustomed manner. This action was made returnable at a distant date, and, in the interval, which elapsed between the service and return of the same the proceedings were commenced in the present cause.

CAMPBELL, for Plaintiff, pretended that, in order to support Defendant's plea, he should establish three things 1st that there was a *procès pendant entre les mêmes personnes*, 2nd *pour même chose*, and 3rd *pour même cause*, now how stood the cases in question, why, Lloyd's action was one *en partage*, the present by Boswell was one *en licitation*, two very different things were demanded by the conclusions, both these actions were well known to the law, and the distinction between them well settled, the former demanded that the property should be divided, the latter that it should be sold, and so satisfied was Plaintiff in this suit that the property was indivisible, that, in one of the allegations of his demand, he stated positively that the property was indivisible, and unless he had proved the same the action must have gone. In Lloyd's action there is no such allegation, his conclusions are those of an action *en partage*. But apart from all this, there is not to be found a single authority under the old *régime* to support the position taken by Defendant, the reason given by the old writers to support such a plea is *quia bona fides non petitur ut bis idem exigatur*, now what good faith is here infringed? Lloyd institutes an action returnable at a long date, almost immediately after, Boswell institutes his action returnable some time earlier than that of Lloyd's, what effect would have the two judgments, the property could not be sold twice, when Lloyd saw Boswell's action returned he should have desisted; any authorities he may have to bear upon the subject must be taken from the modern french law, founded upon an express article of the *Code de Procédure*, art. 967, "qu'entre deux Demandeurs, la poursuite appartien-" dra à celui qui aura le premier fait apposer sur son exploit " par le greffier du tribunal son visa du jour et de l'heure." Tripier, on the modern codes, at the end of each article, shews the difference between the ancient and the modern law, with respect to this article he is silent, thus shewing that it was an innovation on the old law. A modern author, Dutruc, No 341, admits this: "Autrefois ce point devenait souvent l'objet

" de contestations incidentes, toujours fâcheuses par les retards " et l'augmentation de frais qu'elles entraînaient, mais le Code " de Procédure leur a enlevé tout aliment en disposant (art. 967) " qu'entre deux Demandeurs, &c." But, further, it was necessary that Defendant should have some proof to support his plea, he has only the certificate of the prothonotary, no evidence on oath being taken that his action was ever served upon Plaintiff or returned into Court. (1)

LLOYD, JAS. C. for Defendant: The authorities which I shall cite to the Court in the present case will have the effect of establishing most clearly and satisfactorily that Defendant's plea of *litispendance* is well founded in law and in fact, and ought to be maintained by the Court. I shall submit to the Court, 1st the nature of a *litispendance*, 2nd the circumstances under which it takes place and may be pleaded, and 3d its effect upon a subsequent action or proceeding. *Litispendance* consists in the proceedings before a Court of Justice between certain parties, for a certain thing, and with a certain and defined object in view, and may be pleaded when another action similar in its nature arising out of the same cause, and with the same object in view, is instituted by one person against another, both of them being parties to the former, and still undecided action. It is not necessary, to entitle a party to this plea, that the second action be brought by the same Plaintiff against the same Defendant as those engaged in the former action; it is sufficient that the same persons are engaged in both cases; and, in this view, all the authors seem to concur when they say *litispendance* may be pleaded when a former action is pending *inter easdem personas, entre les mêmes personnes.* We also find this principle in the decisions lately rendered in France. In the Jurisprudence Generale, 1847, by Dalloz, vbo. *Exceptions*, Art. 3, 4me part., p. 239, *Litispendance*, the following judgment is reported: " La Cour: Attendu que Canuet a assigné les frères Lalouette devant le tribunal de commerce de Paris, par exploit du 22 juillet, 1844; que les frères Lalouette ont assigné Canuet devant le tribunal du Havre, par exploit du 25 juillet, même année, que l'action de Canuet et celles des frères Lalouette avaient le même objet, celui de faire statuer sur la validité d'un achat de cotons par Canuet; que le tribunal de Paris a été le premier saisi; que l'indication de l'audience à Paris pour le 8 août, tandis que cette indication aurait été faite au Havre le 6 août, ne peut avoir l'effet de changer la

(1) *Stephens* vs. *Tidmarsh*, 5 R. J. R. Q., p. 65; 1 Pigeau, Pro. Civ. du Chatelet, p. 39, 156, 198, 199; Ibid. 2 vol., p. 247; Inst. de Just., par Ferrière, vol. 6, p. 184; Lebrun, *des Successions*, p. 247; 1 Duplessis, p. 92, 93.

jurisdiction fixée par la date de l'action." By this judgment, it will be seen that *litispendance* exists even although the parties Plaintiff and Defendant occupy different positions in the two actions. A more important question however was settled in that cause; the ruling of the Court was, that: "En matière de litispendance, c'est par la date de l'exploit introductif d'instance, et non par celle du jour indiqué pour l'audience, qu'on doit déterminer quel tribunal a été le premier saisi." By this authority, it is clear that the *lis pendens* commences not with the entry of the action, but with the issuing of writ. In the present case the position of Defendant is even more advantageous; not only had his writ issued, but his action had been served, and Boswell, the present Plaintiff, Defendant in the other cause, was by the service fully informed of the commencement of the proceedings in that cause for several days previous to the institution of the present action. As to the effect of *lis pendens* on a subsequent action, it is most simple, it has the effect of causing the dismissal of the action, and this very properly so, for if it were otherwise, what power would be given to an unjust although wealthy man; as one of the authors observes, a wealthy man might harass his adversary by a multiplicity of proceedings, and thus force him to a settlement or compromise, most prejudicial to his interest. In the present case, all the circumstances necessary to constitute a plea of *litispendance* exist and have taken place. It is not denied by Plaintiff that the property in question is the same. It was argued that the causes of action were not the same, that the objects sought for in the two actions were dissimilar, and that the actions were between different parties. The present action is founded on the joint ownership of an immoveable alleged to be indivisible, and the object sought is the *licitation* of this property, the action invoked as creating *lis pendens* is founded on the joint ownership of an immoveable alleged to be held *par indivis*, and the object sought is the division or *licitation* of the same. I must say I cannot see a difference sufficient to warrant the rejection of my plea. The difference consists simply in the wording of the two declarations, the real ground of both actions is the same, viz: the immoveable property held *par indivis*, and the object sought for in both is the *licitation* or *partage*. It was argued at some length that the objects sought for were different, that in the present action the object sought for was the simple *licitation* of the property, whereas in the other action a *partage* was asked for if a division were possible, and if not, then it was asked that the property should be sold by *licitation* Here again the difference is simply one of words. The present action is defective in not concluding for the division or *licita-*

tion of the property, the action *en licitation* always includes a demand *en partage*, and the fact that the Plaintiff has omitted to include that very usual and necessary demand in the conclusions of his declaration will not, I am certain, be considered by the court as a sufficient reason for the dismissal of the plea. The remarks already made, and the following authorities, will, among other things, convince the court that it is unnecessary that the parties Plaintiff and Defendant should occupy the same positions in both actions to entitle the Defendant in the second action to plead that the subject matter of the suit brought by Plaintiff is already pending and undetermined between them before a Court of Justice. (1)

STUART, Justice: This is an action for the licitation of a certain immoveable property. To this action Defendant has pleaded *lis pendens* and he must succeed upon his plea. It was argued for Plaintiff that the plea was not founded because the actions were not based upon the same allegations, and did not contain similar conclusions. It was very strongly urged that the present action was a simple proceeding for the licitation of the premises, and that the action invoked by Defendant as creating *lis pendens*, was an action containing two demands, one *en partage*, the other *en licitation*; but supposing this pretension to be correct, there is still the demand *en licitation*, and Defendant's plea is well founded. But, apart from this, the plea is good, inasmuch as the action *en licitation* always includes a demand *en partage*. It was further argued for Plaintiff that the parties to the two actions were not the same, that Boswell was Plaintiff in the present action, and Defendant in the other; but this argument loses its force when we consider the nature of the action *en licitation*. In all actions of this nature such as actions *en bornage, partage*, etc., the parties Plaintiff and Defendant have equal rights, and in fact the Defendant is equally and as much the Plaintiff as the Plaintiff himself. The plea of *litispendance* must therefore be maintained and the action dismissed; judgment: action dismissed, with costs. (12 *D. T. B. C.*, p. 447.)

CAMPBELL, for Plaintiff.

HOLT, Counsel.

LLOYD, Jas. C., for Defendant.

(1) Ord. de 1667, Bornier, vol. 1, titre VI, art. 3, en note. Sur la même Ord., Serpillon, titre VI, art. 3, en note 4; *Idem, com.* par Jousse, titre VI, art. 3, en note 4; *Idem, com.* par Rodier, titre VI, art. 1, en note; Ferrière, *Dict. de Droit*, vbo. *Litispendance*, vol. 2, p. 170; Ferrière, *Intr. à la Pratique*, vbo. *Littspendance*; *Com. des Ord. de Louis XIV*, par Bornier, titre IV, art. 4, pp. 419 et 420; Guyot, *Rép. de Juris.*, vbo. *Litispendance*; Pothier, *Proc. Civ.*, part. I, cap. 2, sec. 4, pr. 3; 2 Code Nap., *Proc. Civ.*, part. I, livre 2, titre IX, No. 171; Dalloz, *Dict.*, vol. 7, vbo. *Exception*, art. 2, pr. 1, 2 et 3, p. 506; Dalloz, *Juris. Générale*, 1846, vbo. *Exception*, art. 3, *Litispendance*, 4e part. p. 239; Merlin, *Question de Droit*, vol. 5, vbo. *Litispendance*.

TARIF DES AVOCATS.

SUPERIOR COURT, Quebec, 7th November, 1862.

Before TASCHEREAU, Justice.

BOSWELL *vs.* LLOYD.

Jugé : Qu'il ne sera accordé aucun honoraire pour réaudition, à moins que telle réaudition n'ait lieu par un ordre spécial de cour et pour mettre la cour à portée de connaître plus amplement la cause. (1)

This was a motion to revise the protonotary's taxation of Defendant's bill of costs. The Defendant claimed a fee for *rehearing* which took place under the following circumstances. The case was argued in February, 1862, and the *délibéré* was subsequently discharged on account of the absence from the record of a necessary document. After this document was found, Defendant re-inscribed the cause and a rehearing took place. The Defendant pretended that he had a right to this fee because although under the item of the tariff awarding a fee for rehearing, the rehearing must be ordered by the Court, the fee was intended as a remuneration to the attorney for the re-argument of a case, when such reargument became necessary, and because, in the present case, it was absolutely necessary for Defendant's attorney, in the interest of his client, to be heard a second time, inasmuch as Plaintiff's attorney re-argued his case at length. By the tariff, a fee was allowed to attornies for each plea in writing when ordered by the court, (in non appealable cases) yet, the usual fee was always given to the attorney who put in a written plea to an action returnable in vacation ; and why ? because the operation of the law and circumstances rendered a written plea necessary. The Plaintiff answered that by the tariff, the fee claimed was only given when the rehearing was ordered by the court, that, in the present case, the rehearing was not ordered by the court, and in fact, was perfectly unnecessary, the case having been very fully argued at the first hearing, that the court was fully aware of all the important points of the case and only discharged the *délibéré* when the case was first sent up, on account of the absence of a most material part of the record. Judgment : Take nothing by motion to revise. (13 *D. T. B. C.*, p. 18.)

CAMPBELL, for Plaintiff.

LLOYD, JAS. C., for Defendant.

(1) V. art. 33 du tarif des protonotaires de 1879 et art. 36, 37 et 38 du tarif des avocats de 1891.

RESTITUTION D'UN IMMEUBLE.

SESSIONS OF THE PEACE, Quebec, 25 November 1862.

Before: MAGUIRE, Judge.

BOSWELL, et al., Petitioners, and LLOYD, Defendant.

Jugé: 1o. Qu'un juge de paix, hors de session, ne peut octroyer restitution, sur accusation pour entrée ou détention par force, rapportée par devant lui par les Grands Jurés aux Sessions de Quartier Générales de la Paix.

2o. Que la Cour de Sessions de Quartier Générales où l'accusation est rapportée, peut, avant procès, accorder un writ de restitution, mais il est entièrement dans la discrétion de la Cour d'accorder ou de refuser tel writ. (1)

MAGUIRE, Judge: In this case a bill of indictment charging Defendant with a forcible detainer was found by the Grand Jury at the last October term of the Court of General Quarter Sessions of the Peace. The Defendant pleaded not guilty to the indictment, and it was set down for trial on the first day of the next Sessions, in January. Application is now made to me, by petition and affidavit on the part of the private prosecutors, J. K. Boswell and Daniel McCallum, for a writ or warrant of restitution to place them in possession of the premises described in the indictment, and known as the St. Charles Brewery. The petition, supported by an affidavit, recites the counts of the indictment found, and alleges that the forcible detainer is still continued by Defendant. The Defendant, Lloyd, resisting this application, produces also an affidavit which discloses the following facts: "That, on or about the third of January, 1842, Thomas Lloyd, and Paul Lepper, late of the City of Quebec, brewer, now deceased, being the last and highest bidders became the *adjudicataires* and purchasers, *par indivis*, of the premises in question, known and distinguished as the St. Charles Street Brewery, as appears by the sheriff's title herewith produced, that Thomas Lloyd and Paul Lepper, as copartners, carried on business as brewers in the premises, from the third day of January, 1842, and continually until the fifth day of July, 1850, at which time Thomas Lloyd retired from the business, in favor of Paul Lepper, to whom he leased his portion of the premises; that, on or about the fifth day of November, 1860, Paul Lepper, being then in possession of the property in question, as the lessee or tenant of the same, died; that subsequently, to wit: on the eleventh day of September, 1860, Thomas Lloyd, having purchased the unexpired term of the lease under which Paul Lepper occupied the premises in question,

(1) V. art. 89 Code Criminel.

entered into possession of the premises, in virtue of a deed of lease of the same made and passed by and between Thomas Lloyd and George Hall and William Withall, curators duly appointed to the vacant estate of Paul Lepper, on the eleventh day of December, 1860, at the City of Quebec, before Shaw and colleague, notaries; that Thomas Lloyd occupied the premises under and in virtue of said lease until the third day of December, 1861, at which time the undivided half of the premises up to that time belonging to Paul Lepper, or his representatives, was sold by the sheriff of this district to Joseph K. Boswell and Daniel McCallum, the petitioners; that, under and in virtue of said purchase, the petitioners became the joint owners, *par indivis*, of one undivided half of the premises in question with Thomas Lloyd, the proprietor, *par indivis*, of the other undivided half; that, afterwards, to wit: on or about the eleventh day of December, 1861, Thomas Lloyd instituted proceedings against Joseph Knight Boswell and Daniel McCallum, petitioners, for the division and licitation of the premises, which proceedings are still pending and undetermined in appeal, before Her Majesty's Court of Queen's Bench for Lower Canada, appeal side; that, afterwards, to wit: on or about the seventeenth day of December, 1861, Joseph Knight Boswell instituted proceedings against Thomas Lloyd for the licitation of the premises, which proceedings were, on the fourth day of October last, by the Superior Court of Lower Canada, dismissed with costs against Boswell, the Court then declaring that the plea of Lloyd, that there was *lis pendens*, or similar proceedings then pending before the Court, between the same parties, and with the same object in view, to be well founded, as appears by the copy of judgment herewith produced; that, afterwards, to wit: on or about the fourth day of February, 1862, Boswell and McCallum moved the Superior Court for Lower Canada, for a writ of possession to the sheriff of this district to put them into possession of the undivided half of the premises in question, but that this motion or application on the part of Boswell and McCallum was, by a judgment of the Superior Court rendered on the fifth day of the month of March, 1862, refused and denied to them and the motion dismissed with costs; that, afterwards, to wit: on or about the seventh day of February, 1862, Boswell instituted proceedings against Lloyd for rent for the use and occupation of the premises in question, to which action Lloyd pleaded that the demand was exorbitant, and much more than the value of the use and occupation, which was only worth a much smaller amount, which amount Lloyd deposited in Court with his plea, and that these proceedings are still pending and undetermined before Her

Majesty's Superior Court for Lower Canada. "And this deponent further saith, that Lloyd has always, and continually from the said eleventh day of December, 1860, and without interruption to the present time, been, and now is, in the open, public and lawful possession and occupation of the premises: That Boswell and McCallum, the petitioners, never, at any time, ever before or since the 26th day of August 1862, were in the possession or occupation of the premises in question; and never at any time were unlawfully disseized and dispossessed of the same by Lloyd." No attempt has been made by the petitioners to controvert or deny these facts. The argument of counsel for the private prosecutors is, that, on the finding of the indictment by the Grand Jury, they have acquired an absolute right to restitution, and that, having no discretion to exercise, I am called upon by the imperative exigency of the law to grant it, and this, out of session as well as in session; for the reason that the indictment was found before me at the Court of General Quarter Sessions. I must say I am not prepared to accept the view taken by the learned counsel. The party aggrieved by a forcible entry and detainer, or a forcible detainer, may proceed by complaint made to a local Justice of the Peace, and after a fair and open enquiry before a jury, summoned for the purpose, Defendant being also summoned to be present, and the witnesses on both sides heard, should any be offered, then, indeed, such Justice, if the jury find against Defendant, could grant restitution, and I admit that it would be his duty to do so. This case, however, is essentially different. The private prosecutors have proceeded by indictment as they had a right to do, and the indictment has been found by a Grand Jury at the sessions, a proceeding so far purely *exparte*. No case has been cited, nor have I been able to find any case where restitution has ever been granted by a Justice out of Session, on an indictment found by a Grand Jury at a Court of General Quarter Sessions of the Peace. And lord Denman said, in the case of the *Queen* vs. *Harland and others*, that such a power is not to be extended by implication. It is said that Justices in Court or out of Court may grant restitution. So they may. The Justices or Justice seized of the case out of session, after enquiry before a jury, as I have already stated, can grant restitution *out of session*; and when the proceeding is by indictment *at their sessions, as in this* case, and after the finding of the indictment by the Grand Jury, they can *grant it in Court*, if in the exercise of their discretion they think it right to do so. This I take to be the true reading of the authority cited. This application, if made to me while the Court was in session, would have

been regular, and restitution would then have been granted or refused, as the court in its discretion would have determined. But, even then, I do not see how the private prosecutors could have obtained a writ of restitution in the face of the facts contained in Lloyd's affidavit; for " it is a repugnancy to award restitution of possession to one who never was in possession, and it is in vain to award it to one who does not appear to have lost it." (1) A moment's attention to the authorities which I am about to cite will shew how the present application must be disposed of. BURN'S Justice, vol. 2, p. 382: " The party grieved, if he will lose the benefit of treble damages and costs, may be aided and have the assistance of the justices at their general quarter sessions, by way of indictment on the statute 8, Henry 6, which being found there, he shall be restored to his possession by a writ of restitution granted out of the same court to the sheriff." Viner's, *Abridgment*, vol. 13, p. 390: " An indictment for forcible entry was found before the justice of the peace at their quarter sessions or special sessions; they grant a restitution. This writ of restitution ought to be made under the *te-te* of one of the justices before whom it was granted." Cole's *Law of ejectment*, p. 691: " The party grieved may prefer an indictment under the statute for a forcible entry or detainer at the general quarter sessions of the peace. Upon such indictment being found there by the grand jury, and before the Defendant has been convicted, a writ of restitution may be awarded if the court think fit. But it is entirely in the discretion of the court to grant or refuse such writ: " Common law reports, vol. 35, p. 536: The *Queen* vs. *Harland* and others: " At the Yorkshire assizes, a bill was found against the Defendants for a forcible entry and detainer. The prosecutor thereupon applied, on affidavit of the facts relating to the entry and detainer, to WILLIAMS J., one of the judges of assize for the county, for a warrant of restitution of possession. The learned judge refused to grant the warrant at once; but he granted a rule calling on the Defendants to shew cause why it should not issue. Cause was shewn before his lordship *during* the assizes, upon affidavit, when the rule was discharged, the learned judge saying that he considered the granting of the warrant discretionary, and that he determined not to grant it. On affidavit of the above facts, *Newton* now moved, either for a mandamus commanding the judge to issue the warrant or for a warrant from this court. (Q. B.) " Lord Denman after hearing the argument of counsel, said," the proceeding under these statutes is peculiar; and furnishes the only instance,

(1) Russell, *On crimes*, vol. 1, p. 312.

known to the law of England, in which a party may be turned out of possession by *exparte* steps taken. Such a power is not to be extended by implication. *I think that it is a mistake to suppose that the rule compelling the magistrate to act applies to the case of the inquisition of a grand jury.* Here the learned judge, constituting the court upon the occasion, heard the affidavits, and, in his discretion, refused the writ. The learned counsel admits that the application was entirely *exparte:* all must feel that an *exparte* proceeding is to be deprecated, where we are not absolutely compelled to entertain it." The other judges all concurred, and Judge COLERIDGE delivering his opinion, said " if we understand this to be an application for a mandamus, the answer is, that the judge of assize had a discretion. It is said that under stat. 8, H. 6, ch. 9, sec. 3, the law is imperative. That statute prescribes that the justices shall inquire by the people of the same county, and, if it be found that any doth contrary to the statute, shall cause to re-seize the lands, and put the party in full possession. It is a mockery of common sense to say that, in the absence of such inquiry, on evidence furnished only by one party, that party is to be absolutely entitled to the writ. " Rule refused." In this case the prayer of the petition is not granted. (13 *D. T. B. C.*, p. 6.)

PARKIN, attorney for Petitioner.
O'FARREL, Counsel.
LLOYD, attorney for Defendant.
LELIÈVRE, Counsel.

LICITATION.—EXPERTISE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16 mars 1863.

Before AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

LLOYD, Appellant, *and* BOSWELL, et al., Respondents.

Jugé : 1° Que, dans une action en licitation, le Demandeur, propriétaire d'une moitié, ayant conclu à un partage entre lui et les deux Défendeurs, les co-propriétaires de l'autre moitié, les Défendeurs ayant séparément acquiescé à ces conclusions et un jugement ayant été rendu en conformité à icelles, les experts nommés pour constater la divisibilité ou l'indivisibilité de la propriété, doivent seulement faire rapport savoir si la propriété peut, ou ne peut être divisée en deux portions, la question d'une division ultérieure entre les Défendeurs n'ayant pas été soulevée. 2° Que dans telle action, lorsque deux experts ont été nommés pour faire rapport sur la divisibilité ou indivisibilité d'une propriété; et dans le cas où il ne se sont pas accordés sur l'expertise, l'un rapportant que la propriété est divisible et l'autre qu'elle est indivisible, la nomination d'un tiers expert par la Cour nommé d'office, est nécessaire afin de les départager.

The appeal in this cause was from a judgment rendered by the Superior Court, at Quebec, homologating the report of one expert, and rejecting that of the other, there being but two *experts* appointed. In December, 1861, Appellant instituted his action for the licitation of a certain property owned *par indivis*, one half by himself, and the other half by Respondents, who had acquired the same as joint *adjudicataires* at a judicial sale. The Respondents acquiesced in the demand for a licitation, and judgment was rendered as follows. The Court doth declare the parties to be proprietors *par indivis*, to wit: the Plaintiff of one half, and Defendants of the other half of the immoveable property; and for the purpose of the division thereof, required in and by the present action, doth order that the same be viewed and examined by one or more *experts*, to be named by the parties, respectively, within three days from the notice so to do, and, in default thereof, *nommés d'office* by the Court, or by a Judge thereof in vacation, which *expert* or *experts* shall report whether the immoveable property can or cannot be divided into portions corresponding to the rights of the parties, or in what manner partition can be made and if with *soulte*, and should such *expert* or *experts* report that the same cannot be divided advantageously to the interests of the parties; the Court doth further order that the lot of ground and premises, including fixtures and machinery as above described, be sold by licitation *en justice* according to law, and that the proceeds thereof be paid in due course to the parties according to their respective shares therein." In accordance with this judgment, two *experts* were named, viz: Simon Peters, architect and builder, and Henry J. Jamieson, brewer, and these two *experts* having visited the property together, and not being able to agree in opinion as to its divisibility, or otherwise, produced and filed their separate reports; Peters reporting that the property in question was indivisible, and Jamieson reporting that it was divisible. Upon the publication of these two reports, Boswell, one of Respondents, moved, that, inasmuch as, by the report of Simon Peters, it appears that the property cannot be divided so as to give the parties in this cause their respective portions, the said report be confirmed and homologated, and, inasmuch the report of Henry J. Jamieson, does not show that the property can be divided so as to give one half thereof to Plaintiff, one fourth to Defendant McCallum, and the other fourth to Defendant, Boswell, that the said report be rejected; and, on this motion, the court rendered the following judgment, (the judgment complained of): "the court considering that the premises to be licitated have been fitted up and used as a brewery, and that the same cannot be divided so as to leave each part a

brewery, doth adopt the report of the *expert* Simon Peters, and reject the conclusions of that of the *expert* Henry J. Jamieson and doth order that the parties proceed in the cause accordingly."

LLOYD, JAS. C., for Appellant: It is respectfully submitted that the above judgment is incorrect, both in point of law and in point of fact, and first, in point of law: Because, when two *experts* disagree in a case, and lay two separate and different reports before the court, one of these cannot be homologated and the other rejected without some proof of their correctness or incorrectness What proof does the law require? The law requires the report of a third *expert*, the manner of whose appointment is distinctly pointed out. The authorities on this point are convincing and decisive. (1) In the ordinance of 1667, tit. 21, art. 12, it is said: "Si les experts sont contraires en leur rapport le juge nommera d'office un tiers qui sera assisté des autres en la visite," &c. Jousse says that even when two *experts* agree in their reports, but the judge has some doubt, he may order a second visit accompanied by a third *expert:* Bornier says the third *experts* should be named by the court, so that he may be the more disinterested. The modern law of France, foreseeing the difficulties that would arise from the appointment of an even number of *experts*, provided that all *expertises* should be made by one or three *experts*. Montgalvy says that the Code Civ. is a great improvement on the old French law, inasmuch as it provides that an *expertise* must be made by one or three *experts*, and that, under the old french law, when two *experts* disagreed, it was necessary to appoint a third, all these different authors seem to have had but one opinion as to the necessity for the appointment of a third *expert*. It has been said that the judge is not bound by the reports of the *experts*, and that he can homologate or reject one or all of them as he thinks proper, admitting this to be correct to a certain extent, it does not hold good in all cases; granting for the sake of argument that the judge is not bound in all cases by the reports of the *experts*, there are still exceptional cases in which he must decide according to the reports for instance when the judgment is directly based upon the report of *experts*. Vasserot, *Manuel des experts*, says the report of the *experts* does not bind the judge except in certain cases

(1) Ord. 1667, tit. 21, art. 13; Denisart, vol. 2, p. 380, vbo *experts*, sec. 12; Jousse, *Com. sur l'ord.* 1667, tit. 21, art. 13, en note, vol. 2, p. 55; Bornier, *Conf. des ord.*, vol. 1, p. 175, en note, tit. 21, art. 13; Montgalvy, *Traité des arbitrages*, vol. 2, art. 402, p. 88; Pothier, *Proc. civile*, part. 1, ch. 3, *art.* 3; Serpillon, *Com. sur l'ord.* de 1667, tit. 21, art. 13, on note; Dalloz, *Jurisprudence générale*, 1845, vbo *experts*; Vasserot, *Manuel des experts*, p. 26; Montgalvy, vol. 1, p. 91.

where the law imposes on him the adoption of the reports. Montgalvy, arbitrage, says the judge is not bound to follow the advice of *experts* where his conviction is opposed to it, but he says there are exceptions to this rule; thus when the *expertise* is the special manner of determining a question. It will not be denied that an *expertise* was in this case the *moyen spécial indiqué*, for it is the manner pointed out by law for deciding on the divisibility, or otherwise, of the property, and in the present case it is the manner pointed out by the wish of all the parties in the cause, the Plaintiff having asked for it in his declaration, and the Defendants having both consented to the *expertise* taking place. The *expertise* was then the only evidence before the court on which to found its judgment. The *experts* reported differently, and the only course left open to the court was the appointment of a third *expert*. But supposing this judgment to be correct in point of law, and that the judge has the power to homologate or reject either or both of the reports if he think proper, this power is not absolute, there must be reasons assigned as in the case of a judge considering a question where the evidence is contradictory, he will either ask for further evidence, or where that cannot be obtained, he will carefully examine the evidence adduced and consider the respective positions of the witnesses, and their probable knowledge of the subject on which they testify. In this case, further evidence might have been procured, a third *expert* might have been appointed. The court refused to appoint a third *expert*, and it is assumed it had that right. The court received the reports and homologated the one which it considered correct. I submit that this decision of the court was wrong in point of fact. An examination of the judgment under which the *experts* were appointed, and a comparison of this judgment and of the duties therein pointed out to the *experts*, with the reports themselves, will, I think, establish clearly which of them performed his duty, and which exceeded his powers: by that judgment, the court declared that it considered Plaintiff the proprietor *par indivis* of one half, and Defendants the proprietor of the other half of the property, (be it observed not each Defendant the proprietor of one fourth, but Defendants jointly the proprietor of one half) and, in consideration of this fact, ordered the appointment of *experts* who should report whether the property could be divided into portions corresponding to the rights of the parties, one of the *experts* reported on this judgment that the property was indivisible, because it could not be divided into three portions, and this report was homologated; the other, a brewer by occupation for a great number of years, and intimately acquainted with the working of breweries, declares the property

can be divided so as to give one half to the party Plaintiff, and one half to the party Defendant, as the judgment ordered him to do, and if the Court, as is pretended by Respondents, had the power to homologate either of these contradictory reports, it appears to me that the latter having been made in accordance with the judgment was the one which should have been taken by the court as the basis on which to found its judgment.

CAMPBELL, for Respondent, Boswell, maintained the correctness of the judgment appealed from, both in point of law and in point of fact: Our law is clear upon the point that the Courts are not bound to adopt the reports of the *experts*. Guyot, vbo. *Expert*, page 224, paragraph 4, says: "Les experts ne sont point juges; leur rapport n'est jamais considéré "que comme un avis, donné pour instruire la religion du juge, "et celui-ci n'est point astreint à suivre l'avis des experts." The modern law of France is to the same effect. "L'expertise "diffère de l'arbitrage, en ce que les experts ne font que "rendre compte de leur mission et présenter leur avis, *sans* "*que les juges soient astreints à suivre cet avis.* (1) Denisart, in his *Collection de Jurisprudence* vbo. *Expert*, par. 20, says: "Le rapport des experts n'est fait que pour éclairer la reli-"gion du juge, et non pour gêner sa décision; c'est au juge à "examiner le mérite du rapport, dont il peut s'écarter, quand "il croit le devoir faire, (à moins que le fait dont il s'agit ne "soit absolument étranger à ses lumières) parce que l'avis des "experts n'est pas considéré comme autorité, mais comme avis "et mémoire sujets à examen." Lepage, in his *Lois des Batiments*, vol. 2, page 311, expresses the same opinion, in the following terms: "Il est de principe qu'un rapport d'experts "n'est qu'une lumière requise par le tribunal, et non pas une "règle à laquelle les juges soient obligés de conformer leur "décision. Les juges ne sont pas astreints à suivre l'avis des "experts, si leur conviction s'y oppose." Guyot, vbo. *Expert*, p. 224, in the 4th paragraph of the 2nd column, puts the following question: "Mais le juge doit-il ordonner un nouveau "rapport, toutes les fois qu'une des parties le demande et "offre d'en avancer les frais?" and answers thereto "Non!" But even had the answer thereto been in the affirmative, it would have been of no avail to Appellant, as he made no application to have another report made by his *expert*, nor that another *expert* should be named. Dutruc, an author who writes under the modern French law in his "Traité du partage de succession; deuxième partie, Ch. 3, Nos. 368, 372 et 373, is very explicit on the subject. "On sait que le tribunal

(1) *Dict. du Notariat*, vbo *Expert*, vol. 4, page 385, part. 2.

" doit ordonner la vente par licitation des immeubles lorsqu'ils " ne peuvent être partagés commodément; mais il est difficile " de préciser bien exactement une limite à cet égard, cepen- " dant on peut établir quelques règles propres à trancher le ' doute dans les cas principaux." He lays down as fixed principles or rules that, " l'égalité doit régner dans tout partage," and one of the co-proprietors cannot be forced to take a sum of money or other equivalent for his share of the property, while his coproprietor takes the property itself. Another rule laid down by him, is: " l'on doit procéder à la composition " d'autant de lots qu'il y a de copartageants : Que l'on suppose " que les immeubles d'une succession, échue par exemple à " trois héritiers, dont l'un doit en prendre la moitié pour sa " part, et chacun des deux autres un quart pour sa portion, ne " puissent être commodément divisés qu'en deux lots, il n'est " pas douteux que la licitation devra être ordonnée, et que les " tribunaux ne pourront prescrire un partage." Here then is an authority exactly parrallel with the case before us. In the authority just cited there are three heirs, in the present case there are three co-proprietors. It is clear from the reports of both the *experts* filed in the cause that the property in question cannot be *commodément* divided into three parts. Peters says so directly, and Jamieson the other *expert* implies it by reporting that it can be divided into two. The proof before the Court goes then to establish the fact that this property is indivisible, or, at any rate, cannot be conveniently divided between the parties, and the court has rendered the only judgment it could render in conformity with the law, and has ordered the sale by licitation of the whole property.

MEREDITH, Justice: It appears, as well according to the report of Peters, as according to that of Jamieson, as I read it, that the property in question cannot be divided without destroying its distinctive character, *as a Brewery*, and, thereby, it appears to me, materially diminishing the value of the whole of it. I would therefore be disposed to confirm the judgment of the Superior Court. (1) At the same time, if the learned Judge who adjudicated upon this case had thought fit to name a third *expert*, as I believe is about to be done by a majority of the Judges of this Court, I would not have deemed such a proceeding objectionable. Even according to those who think the property in question is not divisible, the case cannot be considered as free from doubt; and, before ordering the licitation of so valuable a property, it might perhaps have been desirable to obtain further information.

(1) Troplong, Vente, No. 863 ; Chabot de l'Allier, vol. 3, p. 121, sur l'Art. 827, Code Civ. ; Bourjon, vol. 2, p. 524, No. 7.

But, neither of the parties moved for the nomination of a third *expert*; and, therefore, I think that the court below was justified in disposing of the case upon the record as submitted. Taking this view of the case, I find that Jamieson, proposes that the property should be divided so that one part of it may, hereafter, be used as a brewery, and the remainder of it, as a malting establishment. He says that, throughout Great Britain and Ireland, with few exceptions, in all large concerns, the brewing and malting are carried on separately, and that malt is bought and sold on change according to sample. No instance, however, is given of any person in Lower Canada carrying on the business of brewing without, at the same time, carrying on the business of malting; nor of any one carrying on the business of malting, without at the same time carrying on the business of brewing; and although it is said, and I have no doubt with truth, that in Great Britain and Ireland, malt is bought and sold *on change* according to *sample*, it is not contended that any such custom exists at Quebec. The property in question appears to have been originally established as a brewery, with a malting establishment attached to it. It was as an establishment of that kind that the parties now before the Court became interested in it; and it appears to me that neither of them has a right, without the consent of the other, to insist upon a division which would render it necessary for them *both* to carry on business in a manner unusual in this country, and which would appear to be contrary to their own views when they acquired the property, and also contrary to the views and intentions of the parties by whom the brewery in question was established. I may add, that it has not even been contended that the property could be used for any other purpose than a brewery without greatly decreasing the value of the whole of it.

BERTHELOT, Juge: Le 3 janvier, 1842, l'Appelant, Thomas Lloyd, et Paul Lepper, devinrent adjudicataires, à la vente qui en fut ce jour-là faite par le shérif de Québec, d'un immeuble désigné comme suit: "All that lot of ground situate and " being immediately in front of the lot of ground last above " described (in the sheriff's title) consisting of 180 feet, or " thereabouts, in front, bounded in front by St. Charles Street, " in the rear by St. Paul Street, on one side towards the west " by John Bell, representing Joseph Noel, and on the other " side towards the east by a street, leading from St. Charles " Street, to St. Paul Street, together with the several houses, " stores and other buildings thereon erected and built, and " thereunto belonging, including the fixtures and machinery; " the said lots of ground and premises situate and lying in the " Lower Town of the city of Quebec." Le 3 décembre, 1861,

les Intimés devinrent adjudicataires à la vente qui en fut faite par le shérif de Québec, de la moitié indivise de l'immeuble ci-dessus désigné, laquelle avait appartenu jusqu'alors au dit Paul Lepper, et continuèrent d'en être co-propriétaires, conjointement et par indivis, jusqu'au jour de l'introduction de la présente demande en partage et licitation, faite le 11 décembre 1861. Par les conclusions de son action, l'Appelant demande à être déclaré propriétaire par indivis d'une moitié de l'immeuble ci-dessus désigné, à en jouir par divis, et que la division et licitation en ait lieu à l'amiable, sinon suivant le cours ordinaire de la loi, et qu'à cette fin il soit procédé à la visite des lieux par experts, pour déterminer si l'immeuble peut se partager commodément, sinon, à ce qu'il soit vendu au plus haut et dernier enchérisseur ; pour le prix en être également divisé entre les parties suivant leurs parts, et que vu le refus des Défendeurs, de consentir à la division et licitation, ils soient condamnés aux dépens. Le 5 mars, 1862, le Défendeur Boswell a déclaré par son avocat, qu'il acquiesçait aux conclusions de la déclaration, excepté quant aux frais. Le même jour, le Défendeur McCallum a aussi fait une déclaration au même effet, consentant au partage, *s'il était possible*, et à la licitation de l'immeuble si cela devenait nécessaire. Cela indique bien que ce Défendeur ne repoussait pas absolument l'idée de la possibilité d'un partage. Le même jour fut rendu le jugement déclarant le Demandeur et les Défendeurs, co-propriétaires *par indivis*, savoir, le Demandeur pour une moitié, et les Défendeurs pour l'autre moitié, ordonnant une expertise pour déterminer : 1° si l'immeuble pouvait être partagé en parties correspondantes aux droits des parties : 2° *ou s'il pouvait être partagé avec soulte :* 3° enfin ordonnant que s'il était rapporté qu'il ne pût être partagé avantageusement, il fût procédé à la vente par licitation, pour le prix en être distribué aux parties selon leurs droits. Pour mettre ce jugement à exécution, H. J. Jamieson fut nommé expert de la part du Demandeur, et Simon Peters, de la part des Défendeurs. Ces deux experts n'ayant pu s'entendre pour faire un rapport conjointement, en ont fait chacun un à leur point de vue particulier. Peters a rapporté que l'immeuble et les bâtisses dessus construites ne pouvaient pas être divisées commodément, de manière à donner une moitié au Demandeur, et un quart à chacun des dits Défendeurs, attendu qu'il n'était pas possible de faire de partage, sans ruiner entièrement l'établissement connu comme brasserie. Voici ses propres expressions : "That the " said lot of ground, buildings and premises are indivisible and " cannot be conveniently divided, so as to give one half to " Plaintiff, a quarter thereof to D. McCallum, and the other " quarter to J. K. Boswell." Je dois de suite remarquer que

ce rapport n'est pas tout à fait conforme à ce que l'on devait attendre, puisque cet expert a pré-supposé qu'il pouvait s'agir d'un partage entre les deux Défendeurs, tandis qu'il ne peut nullement en être question. Dans la présente cause, il ne s'agit seulement que de la possibilité de faire un partage en deux parts, dont une pour le Demandeur, et l'autre pour les Défendeurs, et en second lieu de voir si, ne pouvant pas faire deux parts égales, il y aurait un moyen de faire un partage avec soulte, ce surquoi l'expert Peters n'a point fait de rapport, en sorte que cette partie du jugement n'est pas satisfaite et répondue. Jamieson, par son rapport, a émis l'opinion qu'il y avait moyen de partager l'immeuble et ses dépendances en deux parties ou portions, dont une pour le Demandeur, et une autre pour les Défendeurs, et ce sans retour, ou soulte, attendu que bien que la moitié, ou partie *ouest*, était plus grande en superficie, la partie *est* avait de meilleures bâtisses. C'était assez bien rencontrer l'exigence du jugement interlocutoire quant aux deux premiers points. Si l'expert Peters avait concouru dans ce rapport, il aurait bien fallu y donner suite et faire procéder au partage, mais il a contredit là-dessus l'expert Jamieson, et c'est là la difficulté. La Cour de première instance, par son jugement du 4 juin, 1842, sur motion à cet effet de la part du Défendeur Boswell, a rejeté le rapport de l'expert Jamieson, et a homologué celui de l'expert Peters, pour les motifs suivants: "Considering that the premises to be "licitated in this cause have been fitted up and used as a "brewery, and that the same cannot be divided, so as to leave "each part a brewery; doth adopt the report of the *expert* "Simon Peters, and reject the conclusions of that of the *expert* "Henry J. Jamieson, and doth order that the parties proceed "in the cause accordingly." L'Appelant se plaint de ce jugement, en citant l'article 13 du titre 21 de l'ordonnance de 1667. "Si les experts sont contraires en leur rapport, le Juge nom-"mera d'office un tiers qui sera assisté des autres en la visite, etc.;" et maintient que ce qui est exigé par la loi à cet égard n'a pas été observé, et qu'il aurait fallu procéder à la nomination d'un tiers expert. Sans entrer dans la discussion de cette question, il suffit pour les fins de cet appel, de s'enquérir si par l'un ou l'autre de ces rapports, il a été satisfait et répondu à ce qui était exigé et demandé par le jugement du 5 mars, 1862. Je crois qu'il est impossible de nier que le rapport de Peters a entièrement failli d'y satisfaire, et que cet expert est tombé dans une erreur complète en s'enquérant de la possibilité de faire un partage par moitié et par quart; ce n'était pas cela dont il s'agissait, et son rapport aurait dû être renvoyé, au lieu d'être homologué. Si un des deux rapports pouvait et devait être homologué l'un plus que l'autre, c'était

assurément celui de Jamieson, puisqu'il paraît avoir répondu à tout ce qui lui était demandé, mais ce n'est pas encore cependant ce qui pouvait ou devait être fait, attendu le rapport de Peters, qui différait de celui de Jamieson, et c'était le cas pour la cour d'ordonner, vu la différence d'opinion des experts, et l'insuffisance du rapport de l'expert Peters, qu'il fût procédé à la nomination d'un tiers expert pour les départager, (ou à en nommer d'autres) *aux fins* d'exécuter *à la lettre* le jugement interlocutoire du 5 mars, 1862. D'après la description des lieux, le rapport de Jamieson, et le plan y annexé, il ne paraît pas qu'il y ait impossibilité réelle d'en venir à un partage. Je crois même qu'il peut y en avoir un, sinon sans soulte, du moins bien certainement avec un retour, ce qui peut se faire et doit se faire, s'il est aucunement possible de laisser à chacun une moitié ou une partie de la propriété commune à tous deux. Si personne n'est tenu à demeurer dans l'indivis, l'on ne doit pas non plus ordonner la vente par licitation à moins qu'il n'y ait impossibilité de faire un partage, si l'un des co-propriétaires réclame, et s'oppose à la vente par licitation. Ce n'est que dans le cas où le partage aurait l'effet de déprécier l'héritage qu'il faut avoir recours à la licitation, la propriété est une chose si désirable et si précieuse, qu'il faut, en pareil cas, en laisser à chaque propriétaire indivis une part, s'il est aucunement possible de le faire, sans faire subir une perte ou un dommage à l'autre co-propriétaire. Je suis donc d'avis que le jugement du 4 juin, 1862, doit être infirmé, et qu'il soit ordonné qu'il soit procédé devant la Cour Supérieure, par les mêmes experts assistés d'un tiers, ou par d'autres experts, s'il devient nécessaire, à exécuter le jugement du 5 mars, 1862.

JUDGMENT: "The Court, seeing that Jamieson and Peters, the *experts* appointed have disagreed, and have made two separate and different reports before the court below, to wit: Jamieson reporting that the immoveable property belonging to the parties can be divided into two portions corresponding to the rights of the same, and Peters being of opinion that it would be impossible to divide the said property, lot of ground, etc.; seeing, therefore, that a *tiers-expert* is necessary to divide the controversy, and that, in the judgment of the Court below, by which the court hath adopted the report of one of the *experts*, and hath rejected the conclusions of the other, without taking the advice and opinion of such *tiers-expert*, there is error; it is considered and adjudged that said judgment be and the same is hereby reversed. And proceeding to render the judgment which the Court below ought to have rendered: It is considered and adjudged that the record be remitted to the Court below, to the intent that, in the said

court, it be proceeded, in due course, to name a *tiers-expert d'office*, who shall, with the *experts* already named and appointed, attend and meet Jamieson and Peters, to view and examine the immoveable property in contestation between the parties, to wit: "All that lot of ground etc." And that said *experts* and *tiers-experts* do report whether the immoveable property can or cannot be divided into two portions corresponding to the rights of the parties or in what manner partition can be made, and if so, with soulte or without, and that a *plan figuratif* be filed under the direction of the *experts*, to the intent that upon the report of the *experts* and *tiers-experts* such proceedings may be had as to law and justice may appertain in the premises." *Dissentienbus*, Duval and Meredith. (14 *D. T. B. C.*, p. 274.)

LOYD, James C., for Appellant.

CAMPBELL aud GIBSONE, for Respondent.

BOSWELL, HOLT and IRVINE, for Respondent McCallum.

PROCEDURE.—CONTESTATION L'OPPOSITION.

SUPERIOR COURT, Montreal, 28th April, 1862.

Before BADGLEY, Justice.

WALKER, *et al.*, Plaintiffs, *vs.* FERNS, Defendants and DIVERS, Opposants.

Jugé: Que la contestation par un Opposant de l'opposition d'un autre Opposant, qu'il est colloqué dans un projet de distribution, ne sera pas renvoyée sur défense au fonds en droit, quoique la contestation n'énonce aucune réclamation ou privilége de la part du contestant sur les deniers, produits de certains immeubles vendus dans la cause. (1)

In this case an Opposant, Sheridan, contested the *projet* of distribution and collocation, by which the Montreal Building Society, another Opposant, was allowed to rank for $746 48, on the proceeds of certain real estate sold. A *défense au fonds en droit* was filed by the building society to this contestation, on the ground that it did not appear thereby that the contestant had any interest in making such contestation, or that he had any mortgage or claim upon the monies, the proceeds of the sale of the lands. The contestation did not set up the nature of the claim for which the contestant had filed an opposition, but contested the validity of the claim of the building society, for any sum over the amount of $405.

TORRANCE contended that the contestation should have disclosed the nature of the contestant's claim, and should have

(1) V. art. 717 C. P. C.

alleged that it was preferable to that of the building society, or, at least, that the contestant was a creditor of Defendant.

BEDWELL, submitted that, being an Opposant, he had a right to contest the claim of any creditor collocated. The fund which would be set free in the event of the contestation being maintained, must be divided among the opposing creditors, and the contesting party must then be collocated. But, at all events, he could contest the validity of the claim, by setting up that the society was collocated for some three or four hundred dollars above their legal debt, and this was enough to maintain the contestation against a demurrer.

MONK, Justice: The contesting party prays that the debt of one of the Opposants be reduced as being unfounded, and a demurrer is filed on the ground that the contestant has alleged no preferable claim to the monies. I have inquired whether there is any practice of the court requiring an Opposant contesting to set forth his own debt or privilege, but I can find none. I will not therefore dismiss the contestation. Judgment dismissing the answer in law, or demurrer. (12 *D. T. B. C.*, p. 406.)

DEVLIN, for Contestant.

TORRANCE and MORRIS, for the Building Society.

FEMME MARIEE.—MANDAT.

BANC DE LA REINE, EN APPEL,
Montréal 1er Septembre, 1862.

Présents: Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, DUVAL, MEREDITH et MONDELET Juges.

GILTNER, *et vir*, Appellants, *et* GORRIE, Intimé.

Jugé: Que, dans l'espèce, le mari procureur fondé de procuration générale de sa femme, séparée de biens par sentence judiciaire, et agissant en se qualifiant d'*agent*, est censé le faire au nom de sa femme, lorsqu'il est établi que sa position et son insolvabilité ne lui permettaient pas de contracter en son propre nom, et que les ouvrages entrepris étaient faits dans l'établissement tenu au nom de la femme. (1)

MONDELET, Juge, *dissentiente*: L'Intimé a fait saisir, entre les mains de la corporation de Montréal, par saisie-arrêt, sur jugement par lui obtenu contre le mari de l'intervenante, Appelante. La Cour de première instance (Monk J.) a débouté l'intervenante qui prétendait que les deniers saisis entre les mains de la Corporation lui appartenaient. Le jugement est

(1) V. art. 1701 C. C.

clairement motivé. (1) J'en adopte les principes et je pense qu'il doit être confirmé, 1° il me paraît évident que la procuration donnée par l'intervenante à son mari n'a aucun rapport à la matière dont il s'agit. Il ne paraît aucunement qu'elle fût, lors de la passation de cette procuration, marchande publique. 2° Non seulement il n'appert pas que le mari eût l'ombre d'autorité de faire, au nom de sa femme, la soumission pour les ouvrages en question, mais il est évident, aux termes de la soumission, qu'il l'a faite en son propre et privé nom. Et ce qui rend la chose encore plus probable, c'est qu'il réfère au contrat qu'il a déjà obtenu et rempli, l'année précédente. 3° Il signe comme *agent*, agent de sa femme? Non, pas du tout; il ne l'était pas, la procuration donnée *par sa femme séparée* en termes généraux, ne l'a pas constitué agent pour un commerce de marchande publique. Agent, mais de quelle autorité une Cour de Justice declarera-t-elle qu'un individu qui, dans une soumission, parle en son propre nom, offre en son propre nom, agit pour un autre, par cela seulement, qu'il ajoute à son nom, le mot agent? Agent, c'est une manière bien connue de faire des affaires; que ne veut pas dire ce terme d'agent? qu'est-ce qu'il ne signifie pas? 4° Le mari a usé de ce terme sans qu'il paraisse en avoir fait usage autrement qu'en son nom propre:

(1) " La Cour, considérant qu'il est suffisamment établi, par la preuve produite, que, depuis la séparation de biens mentionnée dans l'intervention, le " Défendeur Moïse Gauthier, nonobstant telle séparation, a toujours continué " à exercer son métier de tailleur, à Montréal, pour faire vivre sa famille, et " que, dans le même but, il l'exerce encore ; vu qu'il n'est pas établi, par une " preuve légale et suffisante, que le Défendeur ait jamais été autorisé par sa " femme, l'intervenante, à agir comme son agent ou procureur dans ou pour ses " affaires, comme marchande publique ; considérant qu'il n'est pas prouvé " qu'il, le Défendeur, ait jamais agi en qualité de procureur ou agent de l'intervenante, sa femme, comme marchande publique, vu qu'il ne résulte pas " de la preuve produite que l'intervenante ait jamais fait, ou qu'elle fait actuellement, des affaires ou aucun commerce comme marchande publique, " tel qu'allégué dans et par son intervention ; considérant, de plus, qu'il appert, par la preuve produite qu'en 1859, longtemps après les dates de la " séparation de biens et de la procuration mentionnées dans l'intervention, et " la preuve, le Défendeur a contracté avec les tiers-saisis, en son nom, pour " une affaire semblable à celle dont il est question dans la contestation liés " entre les parties, et, partant, qu'il a, depuis la prétendue séparation de " biens, et depuis la procuration, exercé son métier de tailleur pour son " propre compte ; considérant que le Défendeur, par sa soumission du " dix-neuf avril 1861, produite, n'ayant pas déclaré pour qui ou de la part de " qui il a fait telle soumission, dans les circonstances de cette cause et par les " termes même de telle soumission, doit être considéré comme ayant agi en " son nom et pour son propre compte ; considérant, de plus, qu'il résulte de " l'aveu même de l'intervenante qu'elle n'a rien apporté en communauté avec " le Défendeur son mari, et que l'industrie seule de son mari soutient le commerce que l'intervenante prétend faire comme marchande publique ; considérant, de plus, que l'intervenante n'a pas établi, par une preuve légale et " suffisante, les allégués essentiels de son intervention ; considérant que la " contestation de l'intervention faite par le Demandeur est bien fondée en " droit, et soutenue par une preuve légale et suffisante : Maintient la contestation et a débouté et déboute l'intervention."

autrement, ce serait sanctionner, justifier, légitimer le moyen le plus facile que l'on pourrait employer pour frauder ses créanciers, le mari pouvant, à volonté, dire : " j'ai agi pour ma femme," et dans d'autres circumstances, " j'ai agi pour moi-même. " 5° La déclaration des tiers-saisis aurait dû être contestée. Elle ne l'a pas été, et la femme ne peut et ne doit, en conséquence, obtenir que les deniers soient déclarés lui appartenir. 6° Au reste, le seul jugement que la Cour de première instance pouvait et à dû rendre, était de débouter l'intervention. Il est vrai, en effet, que l'intimé Demandeur ne peut tirer aucun avantage de l'examen qu'il a fait de la femme et de son mari, n'ayant pas, aux termes du ch. 82 des Statuts Ref., sect. 15, fait la déclaration qui est exigée par cette loi. Mais, à mon point de vue, il n'en est aucunement besoin. L'intervenante se trouve sans preuve, et son intervention a été bien et dûment renvoyée. Le jugement de la Cour de première instance devrait être confirmé.

Sir L. H. LaFontaine, Bart, Juge-en-Chef. Le Demandeur, Gorrie, qui est créancier du Défendeur, Gauthier, a fait émaner, le 13 juin 1861, une saisie-arrêt entre les mains de la Corporation de Montréal, à l'effet d'être payé d'un jugement par lui obtenu contre Gauthier, le 24 Décembre 1858. Le Trésorier de la Corporation est venu déclarer que le Défendeur avait contracté avec elle pour la confection de vêtements destinés aux hommes de police ; qu'il avait fait sa soumission en qualité d'agent ; (*as an agent*) que la Corporation avait accepté cette soumission, et que Gauthier, ayant fait l'ouvrage, il lui était dû (*due him*) une somme de 120 dollars, c'est-à-dire, en cette qualité d'agent. Le 11 septembre, 1861, Caroline Giltner, marchande publique, séparée de biens d'avec son mari, par jugement du 19 mars, 1858, la séparation dûment exécutée, est intervenue pour réclamer la somme de 120 dollars comme à elle due, et non à son mari. Le jugement dont est appel, qui a été rendu le 30 novembre, 1861, a débouté Caroline Giltner de son intervention. Par procuration du 8 mai, 1858, Labranche, notaire, Caroline Giltner a nommé son mari son procureur général et spécial. Elle l'a autorisé, dans les termes les plus généraux et les plus étendus de régir, gérer et administrer tous ses biens et affaires. Une copie de la soumission présentée par le Défendeur à la Corporation est produite par Gorrie, et est signée par M. Gauthier, *agent*. Le bail de la maison que Caroline Giltner occupe à présent a été fait à son mari, il est vrai, mais expressément en sa qualité de procureur de sa femme dûment séparée de biens d'avec lui. Il me semble, en outre, que l'Appelante a prouvé que sa séparation de biens était de notoriété publique ; qu'il était bien connu que le faisait publiquement le commerce de hardes faites ; que M. Goyet, l'un de ses témoins lui avançait des fonds, même à

un montant assez considérable, pour l'aider dans son commerce. Cette preuve n'est pas contredite. Le Demandeur n'en a fait aucune à l'appui de sa contestation de l'intervention. Il ne peut, du reste, tirer avantage des dépositions du mari et de la femme, partie dans la cause, faute d'avoir fait, à la clôture de son enquête, la déclaration requise en pareil cas, par la 15e section du chapitre 82 des Statuts Refondus du Bas-Canada. Il me semble donc que, faute de preuve, le Demandeur devait succomber dans sa contestation de l'intervention.

MEREDITH, Justice: It is proved, on the part of Appellant, Caroline Giltner, that, about three years ago, her husband, Moïse Gauthier, having become insolvent, she obtained a separation as to property from him, which was duly executed, and that, since that time, she has, with the assistance of her husband, as her agent, carried on the trade of a merchant tailor, in a shop and premises leased by her from one Beaudry, and that the fact of her being such merchant tailor, was, at the date of the transactions in question, and had for some time previously been, a matter of public notoriety. It also appears that the tender for the articles of clothing, the price of which is in question, was made by Defendant, "as agent," and that, when he so made the tender, he was in fact the agent of Appellant Giltner; and that the fact of his being such agent was then also a matter of public notoriety. And it is also proved that the clothing in question was cut out and made up in the premises of Appellant Giltner, and was delivered by her, acting by her agent, the Defendant, to the tiers-saisis. The evidence establishing these facts is not contradicted in any way; and, if that evidence be true, and we have no reason to doubt that it is so, then it is proved, not only that the clothing was manufactured and delivered by Appellant, but her husband Gauthier could not have done so, in consequence of his insolvency. Much stress was laid on the fact that, in the power of attorney from Appellant Giltner to her husband, no reference is made to the management of the tailoring business which she now says belonged to her. The answer to this objection is, that, although a formal power of attorney was necessary to prove the power of Defendant to do several of the acts mentioned in the power of attorney, yet, that such a power of attorney was not necessary to prove the power of Defendant to act as the agent of Appellant Giltner in the carrying on of the tailoring business so proved to belong to her; and, if that fact be proved, as in my opinion it is, by witnesses, then the evidence so adduced must be deemed, as regards third parties, quite as convincing as any that could have resulted from a declaration contained in a power of attorney made by Appel-

lant Gilner in favour of her own husband. It has also been said that a judgment maintaining the pretensions of Appellant would be an encouragement to frauds ; and it cannot be denied that proceedings *en séparation de biens* are often made a cover for fraud. The laws of this country however allow a wife, obtaining a *séparation de biens*, to carry on a business which had previously been carried on by her husband, and all that the courts of justice can be required to do, is to scrutinize with care such proceedings when brought before them, and to set them aside when proved to be fraudulent or otherwise illegal. But, in the present case, I do not think there is any evidence of fraud, and I therefore agree with the chief-justice and Mr. Justice Duval in thinking that Appellant has reason to complain of the judgment of the court below.

" La cour, considérant que, lors du contrat fait entre le Défendeur Gauthier, non en son propre nom, mais comme agent, et le maire, les échevins et les citoyens de la cité de Montréal, pour la confection d'un certain nombre d'habits et de pantalons pour les hommes de la police de la cité de Montréal, Caroline Giltner, épouse de Gauthier, et dûment séparée de biens de son époux, faisait commerce comme marchande publique en son propre et privé nom, lequel commerce elle avait fait avant le dit contrat et qu'elle a continué depuis : considérant, que pendant tout ce temps, Gauthier agissait comme l'agent de Caroline Giltner, et que les ouvrages dont le prix est réclamé par l'intervenante, Caroline Giltner, ont été faits au magasin par elle tenu et sont les ouvrages de ses employés : considérant qu'en conséquence, l'intervention de Caroline Giltner, réclamant le prix des dits ouvrages est bien fondée, et la contestation d'icelle par le Demandeur, Daniel Gorrie, mal fondée, et que. dans le jugement prononcé par la Cour de Circuit pour le district de Montréal, siégeant à Montréal, le 30e jour de novembre, 1861, maintenant la contestation et déboutant l'intervention de Caroline Giltner, il y a erreur, cette cour infirme le jugement ainsi prononcé par la Cour de Circuit pour le district de Montréal, et procédant à rendre le jugement que la cour de première instance aurait dû rendre, déboute Daniel Gorrie de sa contestation de l'intervention et condamne le maire, les échevins et citoyens de la cité de Montréal à payer à Caroline Giltner, épouse de Gauthier, la somme de £30 courant, avec intérêt de ce jour, et avec dépens, etc." (12 *D. T. B. C.*, p. 454.)

BONDY et FAUTEUX, pour les Appelants.

MACKAY et AUSTIN, pour l'Intimé.

ELECTION DE MARGUILLIER.

COUR SUPÉRIEURE, Montréal, 28 avril 1862.

Présent BERTHELOT, Juge.

BÉLANGER, *et al.*, Demandeurs, *vs.* CYR, Défendeur.

Jugé : 1°Que, suivant la 4e sect, du ch. 67, de la 23e Victoria, intitulé : " acte pour régler la présideuce des assemblées de fabrique dans les paroisses catholiques du Bas-Canada." Il faut une proposition régulière pour mettre en nomination comme candidat une personne proposée comme marguillier.

2° Que, dans l'espèce, la simple expression du désir d'un ou de plusieurs paroissiens qu'une autre personne que celle proposée en premier lieu, fût choisie comme marguillier, ne comportait pas une proposition régulière de cette personne comme marguillier, aux termes de la loi ci-dessus citée. (1)

BERTHELOT, Juge : Les deux pétitionnaires, tous deux cultivateurs et notables de la paroisse, se sont pourvus, en vertu des dispositions du ch. 88 des statuts refondus, pour assigner Pierre Cyr, cultivateur de la même paroisse, et le faire déposséder et exclure de la charge de marguillier dans la paroisse. Les allégations de leur requête sont que, le 15 décembre 1861, à une assemblée dûment convoquée des anciens et nouveaux marguilliers et des paroissiens propriétaires de la paroisse, tenue dans l'eglise du lieu, la dite assemblée appelée pour l'élection d'un nouveau marguillier, François Beautron dit Major, un des paroissiens, fut *régulièrement* proposé par Jacques Brien dit Desrochers et Flavien Fortin, tous deux propriétaires qualifiés, secondés par plusieurs autres paroissiens, pour l'office et charge de marguillier en remplacement de Benjamin Lecavalier. sortant de charge ; que le curé de la paroisse présidant l'assemblée, sans égard à cette proposition, proposa *lui-même* le nom de Pierre Cyr, sans qu'il fût régulièrement proposé, et sans que cette proposition fût secondée, et que, loin de suivre les procédés ordinaires et d'usage, le curé avait clos l'assemblée sans mettre aux voix la proposition que François Beautron dit Major fût élu marguillier, sans prendre l'assentiment des personnes présentes, et sans *déclarer aucun marguiller élu ;* qu'à la suite de cette assemblée, Pierre Cyr avait usurpé la charge de marguillier, et en avait exercé illégalement les fonctions, quoiqu'il n'eût jamais été proposé ni élu, ni proclamé marguillier ; les requérants mettant en fait que, si les procédés de l'assemblée eussent été régulièrement faits, et les propositions mises aux voix, suivant la loi et l'usage, la personne qui eût été élue était François Beautron dit Major. Ils concluent à ce que Pierre Cyr soit déclaré avoir usurpé la

(1) V. art. 3438 S. R. Q.

charge de marguillier, qu'il lui soit ordonné d'abandonner la charge, qu'il en soit dépossédé, qu'il lui soit défendu d'en exercer les fonctions, et, en outre, qu'il soit condamné à une amende et pénalité de £100, ou à toute autre somme à laquelle il sera jugé convenable de le condamner, et aux dépens. Le Défendeur a plaidé qu'il avait été élu, en la manière ordinaire, nouveau marguiller de l'œuvre, pour l'année 1862, et qu'il avait assumé ses devoirs comme tel suivant le cours ordinaire de pareille nomination ; qu'il avait été *proposé* et *élu* à l'unanimité, ainsi qu'il apparaissait par un certificat et extrait du registre des délibérations de la fabrique, produit au soutien de sa réponse et que les allégations de la requête, en tant qu'ils contredisent l'acte de sa nomination, étaient faux et mal fondés, et il conclut au renvoi de la pétition. Les requérants ont répondu, en réitérant les allégations de leur requête, en persistant dans les conclusions prises en icelle, et en demandant à ce qu'en autant que besoin pourrait être la prétendue élection invoquée par Cyr fût déclarée nulle. Par cette partie de leur réponse, les requérants semblent vouloir suppléer à ce qu'ils auraient dû demander par les conclutions de leur requête, c'est-à-dire, la cassation et la nullité de l'acte des délibérations de la fabrique, en vertu duquel le Défendeur avait exercé ses fonctions, avant de conclure à ce qu'il fût dépossédé de la charge, et qu'il lui fut fait défense d'en exercer les fonctions. Les parties ont soumis toute la contestation soulevée par les allégations de la requête, et le plaidoyer soutenu de l'extrait des délibérations de la fabrique, en donnant un consentement à l'effet que, sans inscription de faux contre le registre de la fabrique, et contre l'extrait du registre produit par le Défendeur, il fût procédé à l'enquête sur la contestation, et à faire la même preuve que si les requérants s'étaient inscrits en faux, à ce qu'il fût procédé comme dans une cause ordinaire, et que, sans inscription de faux, jugement fût rendu sur le mérite de la cause. L'extrait des registres constatant l'élection du défendeur est en ces termes : " Après " avoir invoqué les lumières de l'Esprit Saint, par la réci- " tation du *Veni Sancte, après avoir recueilli* les suffrages " des électeurs présents à l'assemblée, laquelle assemblée *s'est* " *déclarée unanimement en faveur* de Pierre Cyr, lequel ici " présent a accepté la charge, et sera en conséquence le nouveau " marguillier de l'œuvre et de la fabrique, à compter du 1er " janvier prochain, et de là à l'avenir." Il s'est agi pour les requérants d'établir la fausseté de ce qui est contenu dans cet extrait des registres. Ils ont allégué comme raisons de leur requête, trois choses : 1o. Que Major avait été régulièrement proposé par Brien et Fortin, secondés par plusieurs autres, pour être élu marguillier ; 2o. Que le curé, messire Dulé, pré-

sident de l'assemblée, avait nommé Cyr comme marguillier sans qu'il eût été régulièrement proposé, ou que la proposition de son élection eût été secondée; 3o. que le curé avait clos l'assemblée sans mettre aux voix la proposition qui avait été faite que Major fût élu marguillier, sans prendre l'assentiment des personnes présentes à l'assemblée, et sans déclarer aucun marguillier élu. Nous allons voir par la suite des faits rapportés s'ils ont réussi à faire la preuve de leurs prétentions. Voici comment Brien et Fortin, qui paraissent avoir été nommés pour soutenir les prétentions de l'opposition, à l'assemblée en question, ont rapporté les procédés d'icelle, dans leurs dépositions au soutien de la requête. C'est dans les termes suivants que Fortin a donné son témoignage: " A cette assem-" blée présidée par le curé, ce dernier a demandé au marguillier " sortant de charge, Lecavalier, qui il mettait à sa place pour " le remplacer. Benjamin Lecavalier dit qu'il proposait Pierre " Cyr; là-dessus, il y eut quelques-uns qui crièrent *oui, oui,* " alors j'ai nommé Major pour être nommé marguillier; en-" suite Brien a pris la parole en s'adressant au curé et il dit " que, *si on suivait l'usage,* on devait prendre le plus vieux; " le curé a répondu là-dessus que les vieux étaient bons pour " les années passées, qu'ils étaient bons pour rapiester la pa-" roisse dans le temps qu'elle était en division; alors Brien a " répondu que l'homme qu'on lui proposait était sain et sauf, " et était capable d'occuper la place de marguillier comme Cyr. " Immédiatement après cette discussion, le curé a demandé à " Pierre Cyr s'il acceptait et il a répondu qu'il acceptait, et le " curé a demandé de suite à ceux qui savaient signer leur nom " de s'avancer. Quand le curé a dit aux personnes qui savaient " signer de s'avancer, les deux personnes dont j'ai parlé plus " haut, avaient été proposées comme marguillier; et l'assem-" blée a été ajournée. Il n'y a eu aucune division sur les pro-" positions qui avaient été faites." Brien rapporte: " qu'après " la proposition de Cyr comme marguillier, il a entendu plu-" sieurs dans l'assemblée crier *oui, oui.* Ensuite, dit-il, j'ai " entendu une voix par derrière moi qui a dit *monsieur Ma-" jor.* Personne *ne répondant,* je me suis levé dans le banc, " et m'adressant au curé, je lui dis: M. Dubé, *si on veut sui-" vre l'usage,* Major est un homme plus vieux que Cyr, c'est " lui qu'on devrait mettre; il est en bonne santé comme Cyr; " M. Dubé s'est penché la tête en *souriant,* et a répondu que, " depuis quelques années, on ne parlait plus d'âge pour les " marguilliers, il s'est ensuite servi d'expressions de vieilles " pièces que je n'ai pas comprises. Là-dessus, je me suis assis " dans mon banc. Alors le curé a demandé à Cyr s'il acceptait " la charge, et a demandé à ceux qui savaient signer de se " présenter pour signer la clôture de l'assemblée." Plusieurs

autres témoins des requérants racontent les choses à peu près de la même manière, et s'accordent tous à dire que le nom de Major a été prononcé avant que le curé ait annoncé que Cyr était élu. Léandre Decôte, le premier témoin du Défendeur, rapporte que : " Cyr ayant été proposé, le curé demanda s'il y " en avait d'autres à proposer et qu'un grand nombre cria *non*, " *non*. En avez-vous d'autres à proposer ? un grand nombre ré- " péta *non*, *non*. M. le curé dit ensuite : Cyr est donc élu unani- " mement ? et un grand nombre cria *oui*, *oui*. En même temps " que l'assemblée criait *oui*, *oui*, j'ai entendu une voix qui " criait Major, Major. M. le curé a continué en disant : Je pro- " clame Cyr élu marguiller. " D'autres témoins du Défendeur rapportent que le nom de Major n'a été prononcé qu'après que Brien eût fait des remarques au curé, ou tandis qu'il parlait, quelques-uns même prétendent qu'il n'a pas été prononcé, ou qu'ils ne l'ont pas entendu. Presque tous les témoins du Défendeur étaient plus près du curé que les témoins des Demandeurs, et l'on peut raisonnablement croire qu'ils ont vu les choses se passer tout aussi bien que les témoins des Demandeurs, qui se tenaient à distance, et même mieux, à raison de la distance. Rien d'étonnant qu'il soit difficile de savoir exactement comment les choses se sont passées dans une assemblée de 300 à 400, surtout lorsqu'elles sont racontées par des partisans de l'un ou de l'autre candidat. Ce qui est bien certain et qui est même admis par les témoins des Demandeurs, c'est que les deux tiers des personnes présentes étaient pour Cyr. Si les Demandeurs ont raison de se plaindre, ce ne peut être que parce qu'il n'y a pas eu mise aux voix, par pour et contre. Fortin et Brien, qui sont les deux seuls qui ont paru désirer l'élection de Major, ne paraissent pas en avoir fait une proposition formelle ; il semble plutôt, d'après leur témoignage et celui des témoins de part et d'autre, que ce n'était que l'expression d'un désir et d'une opinion de leur part sur le choix de la personne, sans qu'ils aient voulu y donner suite en proposant *régulièrement* Major, ainsi que les requérants l'ont allégué dans leur requête. Ils se sont contentés de représenter que, suivant l'usage de la paroisse dans les assemblées précédentes, le choix aurait dû tomber sur un paroissien plus ancien que Cyr. Ce dernier n'étant que de deux ou trois ans plus jeune que Major, ainsi qu'il a été prouvé par plusieurs témoins la différence n'était pas grande, et c'est peut-être la raison pour laquelle Fortin et Brien n'ont pas représenté plus formellement dans le temps contre la proposition et l'élection de Cyr. Il peut se faire que le curé ait cru que la majorité était si évidente pour Cyr, que Fortin et Brien n'avaient pas l'intention de demander une division, puisqu'ils demeurèrent silencieux après qu'il eût répondu à Brien, et lorsqu'il a appelé

les personnes présentes à venir signer l'acte de l'élection de Cyr. C'est alors que les Opposants, Fortin et Brien, auraient dû insister à demander une division, s'ils voulaient formellement proposer Major en opposition à Cyr, et s'ils croyaient réellement que leur candidat pouvait avoir la majorité. Au lieu de cela, ils se sont abstenus et n'ont pas donné suite à l'expression de leur désir. En outre, dans sa déposition, le curé dit que ce n'est qu'après avoir proclamé Cyr, et alors qu'il se baissait pour écrire, que Brien lui dit : " Si on suit l'an-" cien usage, on prendra le plus vieux " ; qu'il répondit alors à Brien, qui sans insister sur son candidat, lui aurait dit : " c'est " bien, monsieur " et ainsi s'est terminé leur conversation. Ceci ne s'éloigne pas de ce que Brien rapporte. Plusieurs des témoins du Défendeur rapportent aussi les choses ainsi. Il est à regretter, toutefois, que le curé, dans cette occasion, tant en ouvrant l'assemblée que durant les procédés, se soit servi d'expressions qu'il n'aurait pas dû se permettre, et qui lui ont été reprochées dans le cours du procès. Il s'est montré trop désireux de faire réussir la candidature du Défendeur, et c'est peut-être la cause du procès actuel. Il aurait dû éviter de dire à l'assemblée " qu'il lui fallait un marguillier à son goût, autrement qu'il abandonnerait les comptes de la Fabrique, que les dévots de la paroisse étaient contre lui," ou autres expressions qu'il n'aurait pas dû se permettre, surtout dans une pareille occasion où il fallait pacifier les personnes présentes qui avaient un droit à exercer, et non les aigrir ou les intimider par ses paroles. Mais, quelque déplacées qu'aient été les expressions du curé, elles n'étaient pas de nature à intimider les paroissiens au point de les empêcher d'exercer leurs droits, s'ils eussent réellement persisté à demander une division de l'assemblée sur le choix des deux personnes proposées, ou prétendues proposées ; d'ailleurs, les Demandeurs ne prétendent pas qu'ils n'ont pu exercer leurs droits à cet égard ou qu'ils avaient la majorité pour élire Major, du moins, ils ne l'ont certainement pas prouvé. Leur grief paraît être que le Défendeur a été déclaré élu à l'unanimité, tandis qu'il n'aurait dû l'être qu'à une majorité quelconque. Le curé a peut-être passé un peu vite sur la proposition, ou *prétendue* proposition, de Major par Fortin, dans son désir extrême de faire réussir l'élection du Défendeur. Mais il est vrai de dire que la proposition de Fortin n'en était pas une, strictement parlant, et elle n'a pas été réellement secondée par Brien. Fortin s'est contenté de crier Major ! Major ! lorsque le curé a demandé l'assentiment de l'assemblée à l'élection du Défendeur par Lecavalier, le marguillier sortant, tandis que Brien s'est contenté d'exprimer son opinion que, si l'on voulait suivre l'usage d'autrefois, l'on choisirait le plus vieux

des deux, et il admet en transquestions qu'après la réponse du curé, il s'est assis sur son banc. C'était presque abandonner formellement la proposition de Fortin. Ils auraient dû à l'instant même demander la division ou protester. Ce n'était certainement pas une proposition de Major comme nouveau marguillier, dans des termes équivalant à ce que l'on peut s'attendre en pareil cas, quand des paroissiens sont désireux de faire une proposition sérieuse et d'y donner suite. Et ce n'était pas non plus s'y prendre de la manière indiquée par la section 4ème du ch. 67 de la 23 Vict., intitulé. "Acte pour régler la présidence des assemblées de fabrique dans les paroisses catholiques du Bas-Canada." "Chaque fois que deux " personnes présentes, ayant droit de voter, demanderont que " les voix soient enregistrées sur une question soumise à telle " assemblée de paroisse, il sera du devoir du président de faire " enregistrer les voix des paroissiens qualifiés à voter présents " à cette demande et qui voudront voter." Il n'y a eu aucune demande d'enregistrement des voix, pas même de division de l'assemblée. L'on n'a même pas dans l'occasion manifesté aucune disposition à trouver à redire aux procédés du curé, du moins, l'enquête ne le prouve pas. Les partisans de Major auraient dû, aussitôt après l'assemblée, s'ils entendaient se pourvoir, faire une protestation par notaires, au nom de tous ceux qui étaient là présents pour Major. C'est ainsi que, dans d'autres occasions et circonstances analogues, ceux qui se sont trouvés en minorité ont donné suite à leur opposition. Bien que le curé paraisse avoir joué un rôle de partisan, tant lors de l'élection que durant l'enquête, son témoignage ne peut être rejeté, parce qu'il est plus ou moins soutenu dans tous les points importants par quelques-uns des 14 témoins entendus de la part du Défendeur.

Le curé jure qu'il n'a pas entendu prononcer le nom de Major. Cela peut s'expliquer en tenant compte de l'excitation dans laquelle il pouvait être, du bruit qu'il y avait, et aussi parce que son attention a été immédiatement attirée par les remarques que Brien a faites, et avec qui il a engagé une conversation sur un ton qui ne dénotait pas cependant le mécontentement de Brien, d'après même la déposition de ce dernier. La déposition du curé Brunet, pour contredire le curé Dubé, sur ce point, ne fait pas voir que ce dernier ait juré différemment de ce qu'il avait dit à messire Brunet. Il peut lui avoir dit qu'il savait que Brien avait voulu parler en faveur de Major lorsqu'il s'est adressé à lui, et, en même temps, il a pu jurer que *lui* (le curé Dubé) n'avait pas entendu le nom de Major proposé par Fortin avant qu'il eût proclamé, ou tandis qu'il proclamait Cyr élu ; il n'y a là rien de positivement contradictoire. De toute la preuve il résulte, que les Demandeurs

n'ont établi aucune des trois propositions de leur requête, à savoir: 1° que Major avait été régulièrement proposé par Brien et Fortin. Il paraît, au contraire, que c'est Brien qui aurait secondé Fortin, si on devait prendre les cris de ce dernier pour une proposition régulière; 2° que le curé avait nommé Cyr comme marguillier sans quil eût été régulièrement proposé. Il y a preuve qu'il l'a été régulièrement, et ce par tous les témoins de part et d'autre. 3° que le curé a clos l'assemblée sans mettre aux voix la proposition que Major fût marguillier, sans l'assentiment des personnes présentes, et sans déclarer aucun marguillier élu. Le contraire est bien prouvé. Il n'y a pas eu de proposition régulière et suffisante de Major, de manière à vicier les procédés du curé, qui n'a pas clos l'assemblée sans avoir eu le soin de proclamer élu le candidat qu'il favorisait. Les requérants n'ont donc pas prouvé les allégations principales de leur requête, et elle doit être déboutée. " La cour considé-
" rant que les Demandeurs et requérants n'ont pas suffisamment
" prouvé les allégués principaux et essentiels de leur requête,
" les a renvoyés et renvoie les conclusions de leur requête, avec
" dépens." (12 *D. T. B. C.*, p. 470.)

CARTIER, POMINVILLE et BÉTOURNAY, pour les Requérants.
ROBERTSON, A. et W. pour le Défendeur.

DEMANDE INCIDENTE.—PROCEDURE.

BANC DE LA REINE, EN APPEL, Montréal, 1 septembre, 1862.

Présents; Sir L. H. LAFONTAINE, Bart,, Juge-en-Chef, DUVAL, MEREDITH et MONDELET, Juges.

DUBOIS, Appelant, *et* LAMOTHE. et al., Intimés.

Jugé: Que, dans l'espèce d'une poursuite par le locateur contre deux locataires solidaires, pour résolution du bail faute de paiement du loyer, une demande incidente sous forme de requête de la part du locateur, pour les dommages résultant de cette résolution ne peut être accueillie si elle n'a pas été dûment signifiée aux deux locataires, dont l'un avait fait défaut. (1)

L'action était pour loyer avec saisie-gagerie, et fut intentée le 14 août, 1861, sous l'autorité du statut des locateurs et locataires, contre la société commerciale de Lamothe et McGregor, pour le recouvrement du quartier de loyer échu le premier du même mois, avec conclusions en résiliation de bail, le Demandeur se réservant son recours pour le loyer à échoir, et les dommages. Le Défendeur McGregor comparut et confessa jugement, suivant les conclusions de la demande, moins toutefois

(1) V. art. 150, C. P. C.

la réclamation pour taxes municipales. Cette confession de jugement ayant été refusée par le Demandeur, McGregor plaida que, par la faute du Demandeur, les Défendeurs n'avaient pu, pendant un mois, avoir possession des lieux, sa maison n'étant pas en ordre, et qu'ils avaient en conséquence souffert une perte de £12 10 0; qu'à cause du mauvais état des portes et des serrures, les Défendeurs avaient eu des marchandises volées, ce dont ils tenaient le Demandeur responsable; qu'ils ne devaient pas de cotisations; que l'action n'aurait dû être que pour £37 10 0. McGregor admet l'action du Demandeur sans conditions, sauf les cotisations, et il ajoute qu'il a offert une confession de jugement en conséquence, mais que, comme le Demandeur l'a refusée, il a droit maintenant de prouver sa réclamation contre le Demandeur, et de la porter en déduction du montant de l'action. Il conclut par demander acte de son acquiescement à l'action de Dubois pour loyer et résiliation du bail, et à ce qu'il lui soit permis de déduire le montant de la réclamation des Défendeurs, et les frais de contestation. La cour ne voulut pas reconnaître à McGregor le droit de faire la preuve de sa réclamation, et condamna les Défendeurs suivant les conclusions de l'action. Mais la cour renvoya en même temps une requête présentée par le Demandeur, lors de l'audition même de la cause, tendante " à " ce qu'il lui soit permis de prendre des conclusions ultérieures " pour donner effet à celles par lui déjà prises en cette cause: " à ce qu'il lui soit également permis de prouver les faits ci- " haut allégués, et de conclure, comme il conclut par les pré- " sentes, à ce que les Défendeurs soient condamnés de payer " au Demandeur la somme de cent douze livres, dix chelins " courant, comme dommage résultant de la résiliation du bail " fait aux Défendeurs, si mieux n'aiment les Défendeurs pro- " curer un autre locataire convenable, ou donner bonne et " valable caution au Demandeur à cet effet, &c." Voici le jugement de la Cour Supérieure, rendu par l'honorable M. le juge SMITH, le 9 septembre, 1861: " The court, considering that Plaintiff hath established the material allegations of his declaration and action, and that Plaintiff did let and lease to Defendants, as co-partners, for one year, the property described in the declaration, for and at the rate of £150 per annum, together with the assessments to be charged on the property by the corporation of Montreal, and that there was due, on and at the time of the institution of this action, one quarter's rent, to wit, the sum of £37 10, together with the assessments then due and owing and payable to the corporation, and which Defendants were bound to pay by the terms of the lease, and which in part had been paid by Plaintiff, for and on behalf of the lessees. And, further, considering that Defendant, Gregor

McGregor, Guillaume Lamothe, the other Defendant, having made default, hath by his plea to the action consented to the prayer of the conclusions of the action taken, in so far as the rent due and the resiliation of the lease are concerned; and, further, considering that the matters and things set up in the plea are insufficient in law to reduce the amount of rent due under the lease, and that the matters and things cannot be set up as a defence to the present action, but should have formed the subject of a substantive demand, under the provisions of the Lessors and Lessees Act, under which the present action is brought. The court doth overrule the plea in that respect, and doth resiliate and annul the verbal lease of the premises made by Plaintiff to Defendants, on or about the first day of April, 1861, and doth condemn Defendants to deliver up to Plaintiff the hereinbefore described premises within three days after the service of the present judgment. And the court, proceeding to adjudicate on the petition of Plaintiff praying that he be permitted to take new and further and ulterior conclusions under the action and *demande*, and considering that it is not competent in law for Plaintiff to take conclusions in damages as prayed for, and which damages consist, as stated in the petition, of a claim for further rent under the lease set out in the action, and not for any breach of any condition of the lease, by reason of which and by law any claim of damages could arise. And, further, considering that Plaintiff hath taken his option to resiliate the lease, a privilege granted to the lessor by law, by reason of the non-payment of the rent, and that, by reason thereof, no further action for rent or damages, in the shape of rent accrued to Plaintiff under the lease so prayed to be set aside and resiliated accrues to Plaintiff, the court doth reject the petition, with costs."

BARNARD, pour l'Appelant: La Cour Inférieure a perdu de vue l'objet qu'a la loi en accordant au propriétaire le droit de faire résilier le bail. Il faut bien le remarquer, la question ici n'est pas quant à la sagesse de la loi qui n'exige, pour que la résiliation puisse être accordée, que la preuve du défaut de paiement d'un quartier de loyer, sans que le propriétaire soit tenu de prouver que les lieux ne sont pas suffisamment garnis pour répondre du loyer. Et au reste, s'il fallait défendre la loi contre le reproche d'être trop rigoureuse, il suffirait de dire que le pouvoir qu'ont les juges d'accorder la résiliation est toujours discrétionnaire, qu'il leur est toujours libre de décider sur le sujet de la résiliation de manière à empêcher une injustice. Mais, quant à l'objet de la loi en accordant la résiliation, cet objet en lui-même est clair. La loi suppose que le propriétaire qui n'est pas payé des loyers échus est exposé à perdre

les loyers à venir, et sa maison lui est rendue afin qu'il puisse la louer à d'autres. Le bail étant résilié, le propriétaire a au moins l'espérance de trouver un autre locataire qui paiera le loyer. Mais, s'il n'en trouve pas, c'est un dommage dont le locataire évincé n'en est pas moins la cause. On peut supposer des cas où un propriétaire, quoiqu'il ait la certitude de ne pas trouver un autre locataire, se trouve forcé, dans son propre intérêt, à demander la résiliation, le cas par exemple où le locataire commet des détériorations, et, en outre, ne paie pas son loyer. Il est possible que ce locataire ne peut répondre ni des dommages ni du loyer, mais est-ce qu'il y aurait justice à refuser au propriétaire une condamnation qui comprendrait non seulement les dommages résultant de l'abus de jouissance, mais encore des dommages résultant de la perte de son loyer jusqu'à l'expiration du bail. (1) Il a droit à un jugement, quand même ce ne serait que pour le faire valoir plus tard, si l'occasion s'en présente. L'Appelant soumet qu'il a droit à des dommages résultant de la résiliation du bail, et, comme les effets saisis et enlevés répondaient de ces dommages comme du loyer, et qu'il ne saurait atteindre le gardien, sinon par une condamnation dans la présente cause, il soumet, en second lieu, que sa requête demandant à prouver les circonstances qui sont cause qu'il est en danger de ne pouvoir trouver un autre locataire, et prendre des conclusions en conséquence, aurait dû lui être accordée.

CROSS, pour les Intimés: Le jugement doit être confirmé pour les raisons suivantes: La Cour Supérieure n'a pas juridiction pour adjuger d'une manière sommaire sur une demande de la nature de celle qui est contenue dans la requête du Demandeur. Ce n'est qu'en vertu d'un privilège extraordinaire accordé au locateur par le statut, que le Demandeur a droit à la résiliation du bail pour non paiement d'un quartier de loyer. Il était trop tard, lors de l'audition finale de la cause, pour adopter un semblable procédé. D'ailleurs, le Défendeur Lamothe n'a reçu aucun avis de cette requête. Le jugement ne prive pas le Demandeur des recours qu'il peut peut avoir à exercer. Les Défendeurs ont tout fait pour terminer le procès, ils ont même acquiescé aux conclusions de la demande, il n'est certainement pas raisonnable, de la part du Demandeur, de venir, à cette phase de la procédure, émettre des prétentions douteuses, sinon tout à fait inadmissibles.

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef: L'action était pour loyer avec saisie-gagerie, et fut intentée le 14 août, 1861, sous l'autorité du statut des locateurs et locataires, pour le recouvrement du quartier de loyer (£37 10,) échu le premier

(1) V. art. 1637, C. C.

du même mois avec conclusions en résiliation de bail. Dans la déclaration du Demandeur, on alléguait un bail verbal, fait seulement pour une année ; dans sa réplique au plaidoyer de McGregor, (car lui seul a comparu et plaidé, Lamothe, l'autre Défendeur ayant fait défaut,) on alléguait un bail-verbal fait pour trois ans. Le Demandeur voulait il par hasard changer ou modifier les causes de son action ? Les conclusions de la demande sont comme suit : " A ces causes, le Demandeur, se réservant son recours contre les Défendeurs, pour le loyer à échoir et les dommages qui pourraient résulter par le fait des Défendeurs, conclut à ce qu'une saisie-gagerie émane pour saisir tous les effets, meubles meublants et marchandises garnissant la bâtisse louée, et répondant des dommages, pour, sur la saisie-gagerie, être procédé suivant la loi ; que le bail soit annulé à toutes fins que de droit, et que possession de la propriété soit remise au Demandeur, et que les Défendeurs soient condamnés, conjointement et solidairement, à payer au Demandeur la somme de £52 10 courant, etc." Outre le quartier du loyer échu, la demande comprenait £15, pour les cotisations de l'année. McGregor n'a contesté que cette somme de £15, et a consenti à une condamnation pour le paiement du quartier du loyer, et à la résiliation du bail. Cependant, toutes les conclusions du Demandeur lui ont été accordées, loyer, cotisations, résiliation du bail, dépens, même à son procureur la distraction de ces dépens. Cependant c'est le demandeur qui a interjeté appel. Assurément, ce ne peut être de cette partie du jugement que je viens de rapporter. Elle lui est toute favorable. Mais le Demandeur dit que, par ses conclusions, il s'était réservé son recours pour le loyer *à échoir*. Il n'était donc pas encore échu ; il ne pouvait par conséquent former partie de l'action, aussi n'était-il pas demandé. Il s'était aussi réservé son recours pour " les dommages qui *pourront résulter*." Il n'en existait donc pas encore au temps de l'introduction de l'action ; bonne raison pour qu'ils ne fissent pas partie de la demande. Aussi n'en était-il pas question dans la déclaration, en dehors des conclusions. Mais, plus tard, le jour de l'audition finale de la cause. le Demandeur présenta une requête, contenant des faits nouveaux, et prenant de nouvelles conclusions, à l'effet que " les Défendeurs soient condamnés de payer au Demandeur la somme de £112 10s., comme dommages résultant de la résiliation du bail fait aux Défendeurs, si mieux n'aiment les Défendeurs procurer un autre locataire convenable, ou donner bonne et valable caution au Demandeur à cet effet." Cette nouvelle demande n'a pas été signifiée au Défendeur Lamothe. Cela suffisait seul pour la faire rejeter ; elle a en effet été rejetée pour la dernière partie du jugement dont est appel.

MEREDITH, Justice: I agree with the Chief Justice in thinking that the want of service of the second or supplementary demand was a sufficient cause for its rejection. It has however been said that Plaintiff had a right to proceed against McGregor alone, if he thought fit to do so. That may be true; but, as the property seized was seized as belonging to Lamothe and McGregor, no proceeding could be taken against the joint property without notice to both the persons to whom it belonged. If it be said that Plaintiff would have been satisfied with a personal condemnation against McGregor, it may be answered that there was no reason for attempting to engraft a demand for a condemnation against McGregor alone, upon an action brought against McGregor and Lamothe jointly. The proceeding rejected by the Court below, viewed as a demand against McGregor alone, was also open to this objection, that it tended, without any sufficient reason, to delay the proceedings in the first case, in which the joint property of McGregor and Lamothe was seized; it therefore tended to injure them; and in addition to this might have added seriously to the responsibility of the officers of the Court charged with the custody of that property. I therefore think that the second or supplementary demand was properly rejected by the learned judge in the Court below.

Jugement confirmé. (12 *D. T. B. C.*, p. 480.)

BARNARD, pour l'Appelant.

CROSS et BANCROFF, pour les Intimés.

TRANSACTION.—ERROR.—FRAUD.

PRIVY COUNCIL, ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, 9th February, 1863.

Present: The Right Hon. Lord CHELMSFORD, the Right Hon. Lord KINGSDOWN, and the Right Hon. Sir JOHN TAYLOR COLERIDGE.

HENRY WULF TRIGGE and ALFRED TRIGGE Appellants, and FLAVIEN LAVALLÉE, Respondent.

Held: By the old french law, in force in Lower Canada, a *transaction*, like an english compromise, is an agreement to put an end to disputes, and terminate or avoid litigation: and in such case the consideration which each party receives, is not the sacrifice of a right, but the abandonment of a claim. The french law in this case has adopted the definition of the civil law.

It is no objection to such a *transaction* that the right was really in one of the parties only. Nor is an agreement of compromise vitiated by mistake of either party in matters of law. If, however, error be the *motif*

déterminant of such an agreement, so as to constitute *dol*, or deceit, if satisfactorily proved, it will vitiate the contract.

If the error relied on be in a matter of fact, and the fact be one not included in the compromise, and of such a character that it must be considered as the determining motive of either of the parties in entering into the agreement, its existence is regarded as a condition implied though not expressed; and then if the fact fail, the foundation of the agreement fails.

Where there was no such error in the agreement, nor any *dol*, or deceit, though alleged, satisfactorily proved, the judicial committee overruled the judgment of the Court of Queen's Bench in Lower Canada, and restored a previous judgment of the Circuit Court upholding an agreement of compromise.

The question raised by the appeal related to the validity of a notarial act, or agreement, entered into on the 21st of May, 1847, between Kenelm Connor Chandler, deceased (under whom the Appellants claimed, and the Respondent, for the purpose of compromising certain disputes which had arisen between Chandler and the Respondent relative to a certain mill-dam erected by the Respondent in and across that branch of the river Nicolet, which separates the *Isle de la Fourche* from the *seigneurie* of St Antoine de la Baie, in the province of Lower Canada, the validity of which agreement was disputed by the Respondent, on grounds, first, that he was induced to enter into the agreement by fraud on the part of Chandler, and in ignorance of material facts of the Respondent's rights; and secondly, that there was no consideration for such agreement.

The following is a translation of the agreement in question:

"On this day, the 21st of the month of May, in the year of our lord, 1847, in the afternoon, Before the undersigned, public notaries for that part of the province of Canada, heretofore constituting the province of Lower Canada, residing in the village, parish, *seigneurie*, and county of Nicolet, in the district of Three Rivers, personally came and appeared Luc Michel Cressé, notary, residing in the said parish and *seigneurie* of Nicolet, acting to the effect hereof in his quality and capacity of duly authorized attorney and agent of Kenelm Connor Chandler, *seigneur*, proprietor and possessor of five divided sixths of the *fief* and *seigneurie* of Nicolet, and of the *Isle de la Fourche* and rivers of the same, residing at his manor house in the said parish and *seigneurie* of Nicolet, of the one part, and Flavien Lavallée, residing in the village and parish of Berthier, in the county of Berthier, in the district of Montreal, lumber merchant, of the other part; which said parties, acting as aforesaid, in order to avoid and terminate amicably the differences and difficulties which have arisen between them in their said capacities, touching the dam of a certain mill erected in the parish of St Antoine de la Baie,

upon or near the south-west branch of the river Nicolet, opposite to a certain lot of land formerly belonging tle Amant Richard, jun., and now to the said Kenelm Connor Chandler, on the said Isle de la Fourche, at the south-west side thereof, the said mill belonging to the said Flavien Lavallée, which said dam the said Flavien Lavallée has constructed and placed across the whole width of the said south-west branch of the river Nicolet, and abutted against the said lot of land formerly the property of the said Amant Richard, jun., and actually that of the said Kenelm Connor Chandler on the said Isle de la Fourche; have agreed to put an end to them by means of the present agreements and stipulations, that is to say, the said Luc Michel Cressé in his said quality agrees to allow the said dam to remain as it is at present constructed and erected so long as the said Flavien Lavallée, his heirs and assigns, shall be pleased and see fit there to leave it and to there re-establish and rebuilt it in the like manner as it at present is constructed and erected, the said Luc Michel Cressé in his said quality promising not to interfere with the said dam, except it be to make use of the water to bring down timber, by passing it over the said dam; and on his part, the said Flavien Lavallée promises and obliges himself by these presents, under the special mortgage of the said mill and its dependencies, in consideration of the above, to pay annually to the said Kenelm Connor Chandler, or to his order, his heirs and assigns, at his manor house or other place fixed for the receipt of the lucrative rights of the said *seigneurie* of Nicolet, the sum of £30 current money of this said province, and of which the first payment of the said sum of £30 currency shall become due and payable on the 11th of November next, and thenceforward to continue to make similar payment each year at the same period so long as the said dam shall remain abutted upon the property of the said Kenelm Connor Chandler, in the locality above mentioned. It is, moreover, expressly agreed, that, in the event of the said Flavien Lavallée, his heirs and assigns, hereafter ceasing to make use of or employ the said dam, or other dam that he may re-establish and reconstruct, to work his said mill or other that he may rebuild and re-establish, in such case, the obligation to pay the said sum shall become extinguished from the moment that he shall so cease to make use of the said dam or other that he may re-establish or reconstruct as above mentioned. Moreover, it is further expressly agreed, that the said Flavien Lavallée shall not pay for any interruptions of use of the said dam that may arise from the repair or reconstruction thereof, but that he shall pay in proportion to the time that he shall make use of the said dam. Moreover, it is further

expressly agreed between the said parties acting as aforesaid, that it shall be lawful for the said Kenelm Connor Chandler, his heirs and assigns, to build and construct one or more mills and manufactories opposite to the said lot of land of the said Amant Richard, jun., and elsewhere, as to him shall seem fit, excepting below the said dam, where the said Kenelm Connor Chandler, shall not build any mill higher up than a certain spot called *mâteux*, and above the said dam not lower down than the first island that is to be found above the said dam. For surety of the payment of the said sum of £30 currency annually as aforesaid, the said Flavien Lavallée has, from this day, specially charged, allotted, bound, and mortgaged a lot of land situate in the said parish of St Antoine de la Baie, in the county of Yamaska, in the said district of Three Rivers, upon or near to the said south-west branch of the river Nicolet, included and comprised within the following limits, the said lot of land having its frontage at thirty feet to the north-west of the dwelling-house hereinafter mentioned; joining a ditch that exists above the mill, also hereinafter mentioned; having a depth from the said south-west branch of the river Nicolet to the land of François Ozias Boudreau, and containing probably about one *arpent* of land in superficies, with a grist mill, millstones, bolts, working machinery, dam scales, weights, store, dwelling-house, store shed, stables, and other dependencies thereon erected. For this have the said parties agreed, whereof deed required and granted." This instrument was executed by Chandler (by his attorney), and also by the Respondent; and, in pursuance of such agreement, as it was alleged, Chandler allowed the dam to remain across the river, and desisted from constructing a canal, commenced for the purposes of a mill which he was about to erect close to the dam, and within the limits in which he agreed not to erect any mill; the agreement being in all respects duly observed by both parties so long as Chandler lived, to whom the Respondent paid the sums which became due under the agreement, from the date whereof the Respondent enjoyed its full benefit. Chandler died in January, 1850, having previously by will devised his whole property, moveable and immoveable, to his wife, Jane Grant Chandler, for life, and after her decease to the Appellants. On the 3rd of June, 1850, Jane Grant Chandler ceded and surrendered her life interest in the testator's property to the Appellants; and they thereupon became entitled in possession to all the estate and interest of the late Chandler in the *seigneurie* of Nicolet and the Isle de la Fourche, and to the benefit of the before-mentioned agreement. After the death of Chandler the Respondent ceased to pay

the sums payable by him under the agreement of the 21st of May, 1847; and on the 17th of December, 1852, the Appellants brought an action upon that agreement against the Respondent, for the recovery of the then arrears of the annual sum so agreed to be paid by him. The Respondent caused such action to be removed from the Circuit Court, in which it had been commenced, into the Superior Court for the Montreal district; and there impeached the validity of the agreement, for want of consideration, and as having been entered into through mistake as to the legal rights of Chandler. But the Appellants were successful, and in the month of June, 1854, they obtained judgment in the Superior Court against the Respondent for the whole sum claimed in the action, and for interest and costs, which the Respondent paid. No appeal was brought against this judgment. After judgment had been so obtained, the Respondent paid to the Appellants the sums which, under the aforesaid agreement, had become payable on the 11th of November, in the years 1852, 1853 and 1854, and also in the years 1855 and 1856, but the Respondent refused to pay the sum which became payable in November, 1857. In consequence whereof the Appellants, on the 10th of March, 1858, brought another action in the Circuit Court for the district of Three Rivers, against the Respondent upon the agreement, to recover the payment of the sum which became payable on the 11th of November, 1857. The Respondent defended the action, and demanded that the agreement might be declared void and of no effect, upon grounds which were, in substance, as follows: that on the 29th of May, 1844, one Amant Richard, being then entitled to that part of the Isle de la Fourche which was opposite to the aforesaid mill of the Respondent, granted to the Respondent and to his brother, Plutarque Lavallée, the right to construct and maintain the hereinbeforementioned dam, and also granted to the Respondent and to Plutarque Lavallée a slip of land fifty feet long and ten feet deep, on the banks of the island, for the purpose of enabling them to construct and maintain such dam upon that island; that the Respondent and Plutarque Lavallée were constructing the dam across the river and on the island in exercise of the right conferred by the grant when Chandler protested against the construction of such dam, and claimed to be entitled to five-sixths of the *seigneurie* of Nicolet and the Isle de la Fourche, with all the rivers, waters, islands, mills, dams, rights, and privileges belonging to the same, and to be entitled to the land occupied by Amant Richard, and to the exclusive right of erecting mills and dams thereon; that Chandler, by his notary, formally required the Respondent, and all other persons, to desist from the construction of the dam, and from

constructing any other dam on the island or elsewhere within the *seigneurie* of Nicolet; that Chandler claimed, not only to be proprietor of the river in which the dam was being constructed, but also to be proprietor of that part of the Isle de la Fourche upon which the dam abutted, and which had been granted to the Respondent and Plutarque Lavallée by Amant Richard; that Chandler induced the *seigneuresse* of St Antoine de la Baie to make a similar protest against the construction of the aforesaid dam; that for the purpose of intimidating the Respondent, Chandler, under pretext of himself establishing a mill, began to dig a canal immediately above and opposite the dam where it touches the aforesaid island, whilst, in truth, Chandler had no right to erect a mill where he had begun to dig his canal, and the place where he pretended he was going to erect a mill was wholly unfit for such a purpose; that the aforesaid agreement had been entered into by the Respondent in consequence of the false representations of Chandler, and under the false impression induced thereby that Chandler was the absolute proprietor of that part of the river Nicolet, in which the dam was constructed, and of the land on which the same rested, whilst, in truth, he had no right either to the one or to the other; that there was no consideration for the agreement, and that the Respondent was entitled to construct the dam upon the island without the permission of Chandler; that the clauses of the agreement which obliged Chandler not to erect any mill in the places specified in the agreement were inserted for the mere purpose of giving a colourable consideration for the agreement, inasmuch as Chandler had no right to erect mills in the river not being a proprietor thereof, and inasmuch as, in truth, the specified places were not adapted for the construction of any mill therein; that Chandler had not himself any mill which would have been affected by the dam; and finally, it was submitted, that the agreement was entered into by the Respondent without any consideration, and by reason of the fraudulent representations and pretences of Chandler and of his agents, and under a mistake as to the rights of Chandler over the river and island; and the Respondent accordingly demanded that the agreement might be declared null and void. In reply to the defence thus set up by the Respondent, the Appellants set out the proceedings and judgment in the action brought by them in the year 1852, and insisted that such judgment precluded the Respondent from disputing the validity of the agreement, on the grounds relied upon by him; and the Appellants also insisted, that by reason of such judgment, the validity of the agreement was conclusively established; and they further relied upon the acquiescence by the Res-

pondent in that judgment, and upon the payment by him of the sums which became due under the agreement subsequent to the commencement of the action. It was proved in evidence by the Appellants, that before the agreement of the 21st of May, 1847, was entered into, and on the 27th of July, 1846, Amant Richard surrendered and yielded up to Chandler the land on the Isle de la Fourche, which the Respondent asserted was the property of Amant Richard at the date of the agreement; and the Appellants also proved that at that date Chandler, and not Amant Richard, was the owner of the land. On the 27th of June, 1859, the Circuit Court pronounced judgment in favour of the Appellants, and condemned the Respondent to pay the sum demanded, with interest and costs. From this judgment the Respondent appealed to the Court of Queen's Bench for Lower Canada, when at the hearing the Appellants abandoned their replication of the judgment of 1854, and withdrew their plea of *chose jugée*, or *res judicata;* and the Court of Queen's Bench, consisting of the Chief Justice, Sir LOUIS HYPOLITE LAFONTAINE, and the Puisne Judges AYLWIN, DUVAL and MEREDITH, on the 17th of December, 1859, gave judgment reversing the judgment of the Circuit Court, upon the ground, that the agreement by the Respondent to pay the annual sum of £30, was entered into by him solely in consideration of the permission granted to him by Chandler in his character of *seigneur* and proprietor of five-sixths of the *fief* and *seigneurie* of Nicolet and of the Isle de la Fourche, and the rivers of the same, to construct the aforesaid dam across the river Nicolet, and that at the time when such agreement was entered into, Chandler was not the proprietor of the waters of the river Nicolet, and that the permission given by him to the Respondent to construct and maintain the dam did not confer upon the Respondent any of the rights for which he stipulated; and the Court of Queen's Bench annulled and set aside the agreement, and condemned the Appellants in the costs of the action.

The following are the reasons of the Judges, upon the appeal before the Court of Queen's Bench in Canada, and the text of the judgment of that Court:

SIR L. H. LAFONTAINE, Bart., Juge-en-Chef: L'Appelant, qui était le Défendeur en Cour de Première Instance, s'était obligé, par Acte Notarié du 21 mai, 1847, à payer à Kenelm Connor Chandler, aujourd'hui décédé, et qui était alors Seigneur de la Seigneurie de Nicolet, la somme de 30*l.* par année, et ce tant que l'Appelant ferait usage d'une certaine chaussée appuyée à l'une de ses extrémités sur une terre qui était dans la censive de cette Seigneurie. Les Intimés (Demandeurs en Cour de Première Instance) sont les représentants de Chan-

dler, et, comme tels, ils avaient intenté, dans la Cour de Circuit des Trois-Rivières, l'action dont il s'agit, et qui avait pour objet de faire condamner l'Appelant à leur payer une année de la rente, savoir 30*l*. Dans une exception ou défense à l'action, l'Appelant a soutenu que l'acte du 21 mai, 1847, n'avait été consenti par lui que par erreur et par suite de menaces qui lui avaient été faites par l'agent de Chandler, qui se prétendait propriétaire des eaux de la rivière Nicolet, tandis que, de fait, Chandler ne l'était pas et ne l'avait jamais été, que, par conséquent, son obligation de payer 30*l* par an était sans cause, et que l'acte du 21 mai, 1847, était nul et devait être déclaré tel par la Cour. La première réponse écrite que les Intimés firent à cette exception ou défense, était qu'en conséquence d'un premier jugement rendu à Montréal dans une autre cause entre les mêmes parties, il y avait eu *chose jugée*. Mais, quelle que pût être la force de cette réponse, même en supposant pour le moment qu'elle pût être bien fondée, il n'y a plus à s'en occuper, car les Intimés ont déclaré devant cette cour qu'ils abandonnaient cette réponse ; qu'ils y avaient même renoncé en Cour de Première Instance. En présence de cette déclaration des Intimés, la loi ne nous permet pas de prendre connaissance de la réponse de *chose jugée*, non plus que des autres procédés qui ont eu lieu sur la première action jugée à Montréal. Pour les fins de la cause, il nous faut donc regarder cette présente contestation comme si elle était la première qui fût intervenue entre les parties, et juger la seule question qu'elle présente ; savoir, Chandler, était-il propriétaire de la rivière ? S'il ne l'était pas, l'acte de 1847 est radicalement nul, et l'action aurait dû être déboutée. Une branche de la rivière Nicolet, celle que traverse la chaussée en question, coule en cet endroit entre les terres de la seigneurie Nicolet et les terres de la seigneurie voisine, appelée la seigneurie de *la Baie du Febvre*. Sa largeur est de trois quarts d'arpent ou d'un arpent. Il existait, depuis plus de trente ans, un moulin sur le rivage de la rivière du côté de la seigneurie de la Baie du Febvre. On avait, pour utiliser l'eau de manière à la faire servir à l'alimentation du moulin, construit une chaussée à travers la rivière. Un bout de la chaussée était appuyé sur la terre d'un nommé Richard, dans la seigneurie Nicolet. Le moulin, qui était connu sous le nom de moulin *Despins*, fut acheté par l'Appelant et son frère, qui, suivant acte notarié du 29 mai, 1844, acquirent de Richard " le droit et le privilège " de bâtir, construire, et ériger un quai ou chaussée sur sa " terre située en la paroisse de Nicolet, vis-à-vis le moulin ci- " devant appartenant à François Despins, et généralement " connu sous le nom de ' moulin de Despins,' en la seigneurie " de St. Antoine de la Baie (du Febvre,) et pour y construire

" et asseoir les dits quai et chaussée, et le droit de creuser les " terrains nécessaires pour recevoir les dits quai et chaussée, " jusqu'à une profondeur de dix pieds prenant de la rivière, " sur cinquante pieds le long de la rivière; pour par les dits " sieurs Lavallée, leurs hoirs et ayants cause, jouir des dits " terrains ainsi occupés pour la construction des dits quai et " chaussée comme bon leur semblera *en toute propriété* de ce " jour à l'avenir." L'Appelant est devenu depuis seul propriétaire du moulin et de la chaussée. Les protêts faits au nom de Chandler contre l'Appelant, dans lesquels Chandler se disait faussement propriétaire de la rivière, et induisait par là l'Appelant en erreur, sont du 4 août, 1846; et, pour mieux parvenir à son but et intimider l'Appelant, il avait eu soin d'obtenir, le 27 juillet, 1846, de Amant Richard son censitaire, un acte de rétrocession de la terre de ce dernier. Quelque droit que Chandler ait pu acquérir à la terre de Richard, en vertu de cette rétrocession faite en 1846, cela n'a pu diminuer en rien les droits antérieurs que l'Appelant et son frère avaient acquis sur cette même terre en 1844. Ces droits subsistaient en entier. Du reste, si Chandler n'était pas auparavant propriétaire de la rivière, l'acte de rétrocession de la terre de Richard ne lui faisait acquérir aucun droit contre l'Appelant, car cet acte était sans effet en ce qui regardait la propriété de cette rivière. Nous sommes donc nécessairement ramenés à cette question de la propriété de la rivière. Après que Chandler eût prétendu être propriétaire de la rivière, après qu'il eût comme tel fait consentir à l'Appelant l'acte de 1847, et après que ses héritiers eurent commencé la présente poursuite, fondée uniquement sur cet acte de 1847, ces derniers ont fini par admettre par écrit dans le cours du procès, que tout cela était faux. Ils admettent " que la partie de la " branche sud-ouest de la rivière Nicolet où sont construits " les moulin et chaussée est incluse dans les limites de la sei- " gneurie de la Baie St. Antoine (Baie du Febvre), mais que " la chaussée est appuyée sur la seigneurie de Nicolet, dont " les demandeurs sont seigneurs." Puisque la branche de la rivière dont il s'agit est dans les limites de la seigneurie de la Baie, il s'ensuit qu'elle n'appartenait pas et ne pouvait pas appartenir au seigneur de Nicolet. La preuve est toute en faveur de l'Appelant, qui n'a pu être induit à passer l'acte de 1847, que par les menaces, les fausses représentations, le dol, et la fraude de Chandler ou de son agent. Ainsi la cause de la promesse ou obligation de l'Appelant n'étant pas valable, l'acte de 1847 doit être déclaré nul et l'action déboutée.

DUVAL, Justice: This action is founded on a deed entitled " accord et convention entre L. M. Cressé, agissant au nom de K. C. Chandler, et Flavien LaVallée," executed on the 21st

May, 1847, before David, and his colleague, notaries, at the parish of Nicolet. K. C. Chandler, by his agent, signed this deed as seigneur and *proprietor* of the fief and seigneurie of Nicolet, of the isle de la Fourche and of the rivers therein, and, for the consideration hereinafter mentioned, promised to allow the dam which LaVallée had constructed across the river Nicolet to remain in *its then* present state, so long as the said Flavien LaVallée and his heirs might desire. At the time this deed was executed, Chandler and the greater number of seigneurs in Lower Canada claimed to be proprietors of the rivers running through their seignories, and would not allow the use of the waters thereof without payment to them of a sum of money. LaVallée, believing the seigneur's claim to be well founded in law, agreed to pay him thirty pounds annually so long as the dam existed. To recover this sum the present action was instituted. The Respondents having withdrawn their plea of *chose jugée* the only question that presents itself for the consideration of this court is the following: Did La Vallée receive any value or consideration for his undertaking to pay Chandler thirty pounds annually ? It is clear he received none. The seigneurs in Lower Canada formerly claimed all the rights exercised in France by the seigneurs having the *haute, moyenne et basse justice*. Among those rights was a claim to the exclusive right of property in the waters of the rivers running through their seigniories. This right has been denied by the courts in Lower Canada. In the case of *Oliva* vs. *Boisonneault*, (1) the law is clearly laid down, and the claims of the seigneurs rejected. In this latter case the reporter

(1) On peut considérer comme un principe général que le public a droit à tous les avantages propres à des fins publiques que l'état naturel d'une rivière offre, et qu'aucun changement ne peut être fait dans l'état et la condition d'une rivière navigable, quant à tels avantages, à moins qu'il n'en résulte plus d'aisance pour le public. Dans le cas d'un petit cours d'eau, les propriétaires des terres sur lesquelles il passe ont certainement le droit d'en faire usage à son passage ; mais même dans ce cas, la loi protège avec soin les droits de tous ceux qui peuvent prendre avantage de cette eau. La quantité de l'eau, dans ces cas, est, de fait, si petite qu'elle ne peut être employée que pour les usages ordinaires de la vie, mais celui qui s'en sert ainsi est tenu de le faire d'une manière non incompatible avec les droits des autres propriétaires des terres sur lesquelles ce cours d'eau coule naturellement. Une diminution partielle de sa quantité est permise, si elle est raisonnable et nécessaire, mais celui qui use de ce droit ne doit pas faire tort à son voisin, en y détournant le cours d'eau, ou en le détenant sans raison. Si le propriétaire d'un héritage que traverse un cours d'eau pouvait détourner ce courant, ou en retenir toutes les caux, au préjudice du fonds inférieur, le propriétaire supérieur aurait le même droit. La loi s'y oppose, par un motif d'équité, et, en défendant à l'un et à l'autre de détourner le cours d'eau, protège également leurs propriétés, par la limitation même qu'elle y apporte. Ils peuvent user de l'eau pendant qu'elle traverse leurs héritages, l'y faire circuler comme bon leur semble, mais à la charge de le rendre, à la sortie de leur fonds, à son cours ordinaire. La maxime "*sic utere tuo ut alienum non loedas*," s'applique à la jouissance des ruisseaux et cours d'eau par les individus, et, à plus forte raison, est-elle applicable à la

has omitted a very important fact, viz., that Boissonnault had erected his *boom* in virtue of a deed entered into with the seigneurs of St Vallier, to whom he paid a sum of money annually, as in the present case. See also Lower Canada reports, volume A. Questions seigneuriales, p. 68 A., and the following pages, containing the opinion of the judges of Lower Canada on this question. Even in France the claim of the seigneurs was denied by the most eminent jurists. In Canada it was absurd, as the seigneurs had not the rights of the *haute, moyenne et basse justice.* The river Nicolet is proved to be a river *flottable,* and all the riparian lots are conceded. A grantee named Richard has been in possession for 20 years of the ground on which rests the dam of La Vallée. It is therefore evident that the contracting parties entered into this agreement under the erroneous impression that Chandler, as Seigneur, had a right to the waters of the river Nicolet, to the exclusion of all others. Such not being the case, the undertaking of La Vallée to pay the thirty pounds annually is no more binding on him than would be his promise to pay a like sum to his seigneur for the use of the highways within the seigneurie. The grounds of the judgment are specially set forth in the judgment itself, It is not necessary to cite authorities to show that by the laws of Lower Canada a promise resting on no valuable consideration given, but made under an erroneous impression as to the law, is not binding.

Le jugement rendu en Cour d'Appel, le 19 décembre 1859, est comme suit : " La Cour, vu l'abandon fait par les Intimés, tant devant cette Cour que devant la Cour Supérieure, de leur allégué de chose jugée contenu dans leurs réponses spéciales aux défenses de l'Appelant, par eux produites devant la Cour Supérieure. Considérant que par leur présente demande, les Demandeurs, en leur qualité de représentants en loi de feu Kenelm Connor Chandler et de feue Dame Jane Grant, son

jouissance des rivières dans lesquelles le volume de l'eau est si grand qu'il offre un avantage non seulement à des particuliers, mais encore à tout le public en général. Suivant le droit français, les rivières navigables ont toujours été considérées comme des grandes voies publiques, et, comme telles, des dépendances du domaine publique, et il en est ainsi des rivières flottables. Dans toutes rivières navigables pour des bateaux ou de grands vaisseaux, et dans toutes rivières flottables, c'est-à-dire, capable de flotter des buches ou des radeaux, le public en Angleterre et en Amérique, a une servitude légale, c'est-à dire un droit de passage, comme dans un chemin public, et, conséquemment, les propriétaires riverains ne peuvent se servir du lit de l'eau de telle rivière d'une manière incompatible avec la servitude ou l'usage auquel le public a droit. Une rivière est flottable quand on peut y flotter des buches ou billots, et un propriétaire riverain ne peut arrêter cette flottaison en construisant une estacade à travers la rivière. *Oliva* vs. *Boissonnault*, Cour d'Appel. Québec, 20 octobre, 1832, jugement prononcé par SEWELL J.-en-C., 1 *R. J. R. Q.*, p. 389, cette cause est citée et approuvée par Dorion, J.-en-C., dans *McBean et Carlisle et al.*, 19 *J.* p. 278.

épouse, réclament du Défendeur paiement de la somme de trente livres courant, que le Défendeur a promis payer au dit feu Kenelm Connor Chandler, ses hoirs et ayant cause, par acte d'accord et convention fait et passé en la paroisse de Nicolet, devant Mtres David et son confrère, le vingt et unième jour de mai, 1847, entre Luc Michel Cressé, agissant en sa qualité de procureur de Chandler et le Défendeur ; considérant que le dit acte d'accord et convention a été consenti par le Défendeur en faveur de Chandler, en sa qualité de seigneur, propriétaire primitif de cinq sixièmes par divis du fief et seigneurie de Nicolet, de l'Isle à la fourche et des rivières d'icelles, et que la promesse y contenue de la part du Défendeur de payer à Chandler la dite somme de trente livres, le onze novembre de chaque année, n'a été faite qu'en considération de la permission accordée au Défendeur par Chandler, en sa qualité de seigneur, propriétaire primitif des cinq sixièmes du fief et seigneurie de Nicolet, de l'Isle à la Fourche et des rivières d'icelles, de construire et asseoir la chaussée du moulin du Défendeur en toute la largeur de la branche sud-ouest de la rivière Nicolet ; considérant qu'au temps de l'exécution du dit acte d'accord et convention, Chandler n'était pas propriétaire des eaux de la rivière Nicolet, et que la permission ainsi par lui donnée au Défendeur n'a conféré à ce dernier aucun des droits stipulés en sa faveur ; considérant que cette erreur cause et motif déterminant du consentement donné par les deux parties au dit acte d'accord, suffit seule en loi pour annuler le dit acte d'accord et convention, et qu'en conséquence il y a erreur dans le jugement prononcé par la Cour Supérieure, siégeant à Trois-Rivières, le vingt-septième jour de juin, 1859, infirme le dit jugement et cette Cour procédant à rendre le jugement que la Cour Supérieure aurait dû prononcer, annulle et met au néant le susdit acte d'accord et convention du 21e jour de mai, 1847, en partie suscité, et, en conséquence, déboute les Intimés, Demandeurs en Cour Supérieure, de l'action par eux intentée contre le dit Appelant, Défendeur en la dite Cour.

From this judgment the present appeal to Her Majesty in council was brought. The Solicitor-General (Sir R. PALMER), and Mr. LINDLEY, for the Appellants : The whole question turns upon the nature and effect of the instrument of the 21st of May, 1847, which is to be construed by the old french law, which prevails in Lower Canada. It is a deed for the settlement of mutual differences, and is by the old french law called a *transaction*, and was so considered and held in the previous judgment of the Superior Court, in 1854 (1). The agreement was entered into

(1) See the report of the case, canadian law reporter, 1854, p. 87.

bonâ fide, and the abstaining by Chandler from prosecuting his rights was a sufficient consideration to support it. It was not a deed of grant as was supposed by the learned judges of the court below, but simply one of compromise, and as such would be valid and binding by the civil law, Digest, lib. 17, tit. 1, L. 29, § 5; cod. lib. 4, tit. 5, L. 1; cod. lib. 11, tit. 4, L. 20; Voet, lib. 12, tit. 6, n° 15; Burge's *Comms. on col. and for. laws*, vol. 3, p. 742, which law is the foundation of the french law; Pothier, *Tr. de l'action condict.* n° 159; Code civil, art. 1351; and the english law, *Gibbons* vs. *Caunt* (1), *Léonard* vs. *Léonard* (2), *Auriol* vs. *Smith* (3), *Haigh* vs. *Brooks* (4), *Longridge* vs. *Dorville* (5), upon this point, is the same. Then if the instrument is good as a deed of compromise, and binding on the parties executing it, as we maintain it is, both by the civil law, as well as by the law of England; is it bad, or voidable, by the old french law which governs the case? Now, the Respondent insisted in the court below, that the deed was void on the grounds of fraud, mistake, and want of consideration. With regard to the alleged fraud, there is no evidence of it, all the evidence, on the contrary, is the other way. The execution of the agreement being admitted, the burden of impeaching it lies on the Respondent. He says, there was a conspiracy between Chandler and the *seigneuresse* of St Antoine de la Baie, but of this there is no evidence; that Chandler pretended to be about to erect a mill; but there is no evidence whatever to show that he did not contemplate the erection of a mill, and there is abundant evidence that there was a dam and a stream, and, therefore, a mill-head might be constructed by him at any time. Then it is alleged, that Chandler represented that the river was wholly in his *seigneurie* whilst in fact, it was in the *seigneurie* of St Antoine la Baie; but there is no evidence of such misrepresentation, and it is inconsistent with the agreement, which is admitted to have been duly executed. As to the want of consideration, the Respondent says, Chandler assumed to grant that which really was not his. Now, the agreement was neither in substance nor form a purchase; it was a compromise and the termination of the dispute between the parties; and that alone was a sufficient consideration. Cod. lib. II tit. 4 Digest, II, L. 65, tit. 6, § 1. The Respondent says, he could have done what he did with-

(1) 4 Ves. 840.

(2) 2 Ball and Bea. 179-80.

(3) Turn. and Russ. 127.

(4) 10 Ad. and Ell. 309, 319, S. C. in error, *ib.* p. 328.

(5) 5 Barn. and Ald. 117.

out the leave of any one, but that was the very question in issue between us, and the subject of the compromise. It is admitted that the dam which Lavallée originally constructed is still standing. The Respondent is, however, estopped from denying our title to grant that which he himself accepted from us, and has enjoyed by virtue of our concession. It was not until after the death of Chandler that any question was raised as to the validity of the *transaction*, when the validity of the agreement had already been determined by the court in our favour. No appeal from that decision was interposed, and the rent agreed on was paid for several successive years. The agreement then, being one of fair compromise and without fraud, cannot be impeached on the ground of mistake, unless both parties to the compromise have proceeded on an erroneous assumption of their rights, and were ignorant of the facts which constituted the validity of the *transaction*. That it was, in fact, an imperfect, and inchoate agreement *ab initio*. Digest, lib. II, tit. 15, L. 61, lib. 12, tit. 6. L. 23, L. 5, sec. 1; cod. lib. II, tit. 4; Götz, *Comms. on mistakes in compromises*, 1797. There was no pretence for saying that there was such ignorance here; the case is not so put in the pleadings, or so treated by the court below; the judgment there proceeded entirely on the assumption that there was no sufficient consideration for the agreement of compromise. The mistake, if there was any, related solely to Chandler's right as *seigneur* and proprietor of the *fief* and *seigneurie* of Nicolet, but his claim was admitted by Lavallée by the terms of the agreement, and has never since been impeached: such a mistake as this is not sufficient, either by the civil law, or the french law, to invalidate a *transaction* of this nature. Domat, *Les loix civiles*, b. 1, tit. 13; Troplong, tom. 17, tit. 653, sec. 137; Duranton, tom. 18, p. 480.

Mr. LORANGER, Q. C., of the canadian bar., and Mr. WESTLAKE, for the Respondent: The notarial act of 1847, is an invalid instrument, by the old french law, as well as by the english law. There is no legal or just consideration for the annual payment of the sum of £30, to Chandler. The recital in the agreement that Chandler was owner of the river, so as to give him control of the mill dam, the subject of the dispute, was not only erroneous, but was fraudulent. The mill was a *banal* mill, erected before the destruction of the feudal tenures in Lower Canada; the proprietor of the *fief* wherein it was situate being compelled to maintain such for the use of the tenants; the dam, therefore, for working the mill, and so much of the land adjacent to it as would be requisite for repairing the dam, formed part of the mill, and could not pass by the grant of the *seigneurie*, but would and did pass by the sale of

the mill; it was a *banalité* right. *Canadian seignorial act*, sec. 9, 1854, abolishing feudal tenures; *seignorial questions*, fol, A, Lower Canada report. Such a misrepresentation of title though not made wilfully, would vitiate the contract, even if it were regarded as a *transaction*. Troplong, tom. 17, n° 151, pp. 656-69-77-78; Story's, *Comms. on eq. jurist.* § 159-93-94. But it was not a *transaction* in any sense in which that term is used by the french law to designate a compromise. There are two principal tests to distinguish a *transaction* from an ordinary contract. First, it must be founded in doubt (Troplong, tom. 17, n° 5, p. 553; Duranton, tom. 18, n° 395, p. 443); and, secondly there must be a mutual sacrifice. Troplong, tom. 17, p. 551, n° 4, p. 563, n° 21, p. 536, n° 27; Duranton, tom. 18, pp. 435-39, n°s 391-2: and the deed itself must show this conclusively, and not by mere recital. Denisart, vbo *transaction*, tom. 4. p. 714; Merlin, *Répertoire de jurisprudence*, vbo *transaction*, tom. 34, p. 371; *ib.* tom. 18, n° 5; Pigeau, *Procédure civile*, tom. 1, p. 4, ch. 2, p. 7. So by the english law, *Edwards*, vs. *Baugh* (1), *Pusey* vs. *Desbouvrie* (2). There is no distinction on this subject between the old french law and the code civil, LaHague, on art. 2057, *Code civil;* Troplong, *Comms.* on art. 2044, *Code civil.* Now, here the agreement between the parties was founded, first, on the common error of law that *seigneurs* were entitled to such rights as were claimed by Chandler over the rivers in their *seigneuries;* and secondly, on the error of fact, that the river at the spot in question was in Chandler's *seigneurie*, and the consideration given for it was for the rights which by this double error were attributed to Chandler. Considered then as an ordinary contract, and not a *transaction*, the agreement of the 21st of May, 1847, is bad, for want of consideration, *défaut de cause.* This is a fatal objection, Pothier, *Obligations*, tom. 1, prop. 21, n° 42; Merlin, *Répertoire de jurisprudence*, vbo *Convention*, tom. 5, p. 356; Denisart, vbo *Contrats*, tom. 5; Domat, *Les loix civiles*, B. 1, tit. 1; code civil, art. 1131. Then, if not a *transaction*, it must be considered as a deed of contract; not a compromise, but an engagement, which must be construed and interpreted by the law applicable to contracts. Now, we contend that, as a deed of contract, it is void; first, for want of consideration; secondly, for error or mistake; and thirdly for *dol*, or deceit, which is fraud. First, the want of a valid consideration. We have already shown none was received by Lavallée, and that alone would vitiate the contract, which, being *sans obligation, sans cause*, is of no effect. Pothier, *Obligations*, tom. 1, p. 21,

(1) 11 Mee. and Wels. 641.

(2) 3 P. Wills. 318.

n° 42; Merlin, *Répertoire de jurisprudence*, tom. 5, p. 356, n° 4, vbo *Condition*: Denisart, tit. 3, pl. 4, vbo *Contrat*; Domat, *Les lois civiles*, b. 1, tit. 1, sec. 5, n° 13; code civil, art, 1131. We say, secondly, that the contract was bad, independently of the want of consideration, inasmuch as it was entered into by Lavallée through error, both as to the facts and as to the law; either of which is sufficient to vitiate the contract, but both combined render it absolutely void. Pothier, *Obligations*, ch. 1, art. 3, sec. 1, n° 17-8; Denisart, tom. 3, p. 327, sec. 8-10, vbo *Erreur*; Domat, *Les loix civiles*, b. 1, tit. 18, sec. 2-8-9-10-11; Toullier, tom. 6, p. 61, n° 57; Merlin, *Répertoire de jurisprudence*, tom. 12, p. 69, vbo, *Erreur*; *ib.* tom. 28, p. 371, vbo *transaction*: Duranton, tom. 18, p. 502, n° 433; Zachariæ, *Le droit civil français*, tom. 5, vbo *transaction*, pp. 83-91; Dalloz, *Répertoire*, tom. 12, p. 3, vbo *transaction*. But besides that, gain, which was the actuating motive, *motif déterminant*, of the deed, was not common to both parties, for the assertion by Chandler of his right as sole proprietor of the river, and his correspondent right to prevent Lavallée from abutting his dam without Chandler's permission. was a false and fraudulent representation of his title, and constituted such *dol*, or deceit as would, by the french law, render the contract void. Pothier, *Obligations*, tom. 1, p. 17, u. 29; Puffendorf, b. 3, ch. 3, p. 273, (eng. edit.); Denisart, *Collect. nouvelles*, vbo *Dol*. The Respondent then being induced to execute the deed of contract of 1847, and being led into error by the false and fraudulent representations made by and on behalf of Chandler the deed itself is invalid; and upon this, as well as the other grounds of objection we have already urged, was rightly annulled by the Court of Queen's Bench, which judgment ought not, as we submit, to be reversed.

Their lordships' judgment was delivered by the Right Hon. Lord KINGSDOWN: In the month of March, 1858, the Appellants instituted a suit in the Circuit Court of the district of Three Rivers in Lower Canada, against the Respondent, to recover a sum of £30, alleged to have become due to them from him in the month of November preceding. The claim was founded on a notarial act, dated the 21st of May 1847, by which the Respondent engaged to pay the annual sum of £30, so long as he should use a certain milldam and quay. The payment was to be made to a gentleman named Chandler, whose rights had become vested in the Appellants. The Respondent in his answer to the suit did not deny the fact of the agreement, or that he had had the use of the dam and quay during the twelve months for which the payment was demanded; but he alleged, that the agreement in question had been obtained from him under a mistake on his part

of his rights and by means of fraud and intimidation on the part of Chandler and his agents; that no consideration had been given to him for the agreement, and he insisted that it ought to be annulled, and the Plaintiffs' suit dismissed. On the 27th of June, 1859, the Circuit Court pronounced judgment in favour of the Appellants, and condemned the Respondent to pay the sum demanded, with costs. On appeal to the Court of Queen's Bench, that court reversed the judgment of the Circuit Court, annulled the agreement in question, and dismissed the Appellants' suit with costs. From this decision the present appeal is brought to Her Majesty in council. Chandler was the owner of five-sixths of the *seigneurie* of Nicolet, which adjoins the *seigneurie* of La Baie. The south-west branch of the river Nicolet runs through these two *seigneuries*, and at the point where the dam in question stands, the whole channel of the river is within the *seigneurie* of La Baie, but the shore or bank on the Nicolet side of the stream is within the *seigneurie* of Nicolet. On the La Baie side of the river was a grist-mill, called the *Moulin de Despins*, which was worked by means of water diverted from the river by a *chaussée*, or dam. This mill was what is termed a *moulin banal* and has been built by the *seigneurs* of La Baie. In the month of April, 1844, the mill, with the dam, and all the rights belonging to the mill, was purchased by the Respondent and his brother, and conveyed to them accordingly. The purchasers having taken possession were desirous of extending and making alterations in the dam, by which the water of the river was diverted to their mill. Whether the old dam extended across the whole stream, or only across a part of it; whether there was to be an entirely new dam, or only a repair of the old one; whether the new work was to be on the old site, or the site was to be changed, are matters which were disputed at the bar, and with respect to which we are not able to arrive at any certain conclusion. But this is certain that a very important change was to be made in the dam in one respect; that whereas the original dam was confined within the *seigneurie* of LaBaie, the new dam was to be extended into and supported and rendered more effectual by works carried into the *seigneurie* of Nicolet. It was to be built for some depth into the opposite bank in the island of La Fourche (which in this part of it is within the *seigneurie* of Nicolet), and flanked on each side by a quay. To do this it was of course necessary to procure the consent of the proprietor of the land so to be encroached upon; whether the consent of the *seigneur* of Nicolet was not also necessary, appears to us, for reasons which we will presently state, to admit of much

doubt. Amant Richard was proprietor of the land in question, deriving title under the *seigneurs* of Nicolet, and on the 29th of May, 1844, Amant Richard by notarial deed granted to Lavallée and his brother, the right and privilege of building, constructing and erecting a quay or dam (the french words, in this part of the instrument, are *quai ou chaussée*) on his land in the parish of Nicolet opposite the mill, called *Moulin de Despins*, in the *seigneurie* of La Baie, and the right of digging out of the land necessary to receive such quay and dam (the words here are *quai et chaussée)* to the depth of ten feet from the river, and to the length of fifty feet along the river. This grant is made to the sieurs Lavallée, their heirs and assigns to enjoy the land so occupied by the said quay and dam, *comme bon leur semblera en toute propriété de ce jour à l'avenir.* The grant is stated to have been gratuitous, but whether gratuitous, or for consideration, is immaterial, The Lavallée proceeded to execute these works, and while they were engaged on them they were served with two notices by a person named Cressé, professing to sign one notice as attorney for Chandler, the owner of five-sixths of the *seigneurie* of Nicolet, and the other as attorney of Mme de Lozeau, the owner of the greater part of the *seigneurie* of La Baie. Both these notices required the Lavallée to desist from the works which they were then erecting, as prejudicial to the rights of the *seigneurs* of La Baie and Nicolet. The notice of Mme de Lozeau alleged, that the Lavallée were building a dam, quays, and other constructions within the *seigneurie* of La Baie at other places than those included in their grant. It does not appear that anything was done in consequence of the notice of Mme de Lozeau and probably the allegations on which it rested turned out to be without foundation. The allegation of Chandler, and the rights set up by him will be considered more conveniently when we deal with the objections made to the agreement. For the present purpose it is sufficient to say that his notice rested entirely on his rights as *seigneur* of Nicolet, and contained no mention of a deed which had been executed a few days before by Amant Richard. The notice was served on the 4th of August, 1846. On the 27th of July preceding, Chandler had procured a grant, which is called a retrocession, from Amant Richard, of a strip of land which would, as we understand it, include the strip already granted by him to Lavallée. We are of opinion that Chandler, if the fact were material, must be held to have had notice of Lavallée's grant. The object of the retrocession was, if possible, to defeat that grant. The grant to Chandler extended considerably further along the river and considerably deeper from the river than Lavallée's, and would, therefore,

include and surround it on the land side. In this state of things, Chandler insisted, that he had a right, and alleged that he intended to built a mill on the land so obtained from Richard, and by means of a canal cut into the river above the dam of Lavallée, to withdraw all the water from Lavallée, and divert it to the mill which he so proposed to erect. It is proved in evidence, that though the mill was never built, nor, as far as appears, begun, the canal was dug to a certain depth, and that if it had been continued, as was threatened, to the depth of another foot, it would have withdrawn all the water from the Respondent's dam, and left the channel of the river at that point dry. In this state of things, the agreement was made, which is the foundation of the present dispute. It was made on the 21st of May, 1847, between Chandler, described as *seigneur*, proprietor, and possessor of five divided sixth parts of the *fief* and *seigneurie* of Nicolet, and of the Isle de la Fourche and rivers of the same, acting by Cressé, his attorney, of the one part, and the Respondent, described as a lumber merchant, residing at the village of Berthier, in the district of Montreal, on the other part. It appears that the Respondent had at this time acquired the share of his brother in the mill. The agreement expresses that, in order to terminate amicably the disputes and differences which have arisen between the parties with respect to the dam in question, which is stated to "a but against the lot of land late of Amant Richard, and now of Chandler," they have agreed to put an end to them by means of the present agreements and stipulations. Then Chandler agrees, on his part, to allow the said dam to remain as it is at present constructed and erected, so long as Lavallée shall see fit there to leave it, or to reconstruct and rebuild it; and Chandler promises not to interfere with the said dam, except it be to make use of the water to bring down timber and pass it over the said dam. Lavallée, on the other hand, agrees to pay to Chandler the sum of £30, on the 11th day of the following month of November, and to continue to pay the same sum annually on the 11th of November, so long as the said dam shall remain abutted upon the property of Chandler, in the aforesaid locality. In case of Lavallée ceasing to use the dam the payment is to cease. It is further agreed between the parties, that Chandler shall be at liberty to build one or more mills or manufactories, opposite to the said lot of land of Amant Richard, or elsewhere, as he shall see fit, except that he shall not build any mill within a certain specified distance above or below the mill of Lavallée. Against the validity of this agreement, it is urged that Chandler gave no consideration for the benefit which he received under it; that he had no right whatever to interfere

with the dam of the Respondent, either in his character of *seigneur* of Nicolet, or as purchaser from Richard; that a portion of the river Nicolet across which the dam extended was not within the *seigneurie* of Chandler, and that if it had been so, such circumstance would have conferred no right on the *seigneur*; and that as to the agreement not to build mills or manufactories within certain limits, such concession was worthless, for that no mill could have been advantageously built within those limits for want of water power. If by the deed in question Chandler had professed to grant, and Lavallée had agreed to take, a lease of this dam, paying a rent of £30 per annum as a consideration for it, it might have been argued that the consideration which he had agreed to give for the grant had wholly failed, if in fact Chandler had no rights to confer. But this is not the nature of the agreement; it is quite of a different character. It falls under the head of what in french law is termed a *transaction*, and in english, a compromise. It is an agreement to put an end to disputes, and to terminate or avoid litigation, and in such cases the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim. The french law to which we must look for the decision of this case adopts the definition of the civil law, and it is expressed by Domat, *Des transactions*, b. 1, tit. 13, sec. 1, in these words: *La transaction est une convention entre deux ou plusieurs personnes, qui, pour prévenir ou terminer un procès, règlent leur différend de gré à gré; de la manière dont ils conviennent; et que chacun d'eux préfère à l'espérance de gagner, jointe au péril de perdre.* (It is no objection to the validity of such a compromise that the right was really in one of the parties only. If two persons claim adversely to each other the inheritance of a deceased person, and in order to avoid litigation agree to divide the inheritance between them, it is no ground for setting aside the agreement that one only was the heir, and that the other, therefore, gave up no right which he really possessed.) The consideration which Lavallée agreed to take for this grant was the abandonment by Chandler of all attempts to disturb him in the enjoyment of his mill and dam, and the agreement not to erect within certain limits new mills, and this consideration he actually received. There is, therefore, clearly no reason for annulling this agreement on the ground that Lavallée received no consideration for it. But it is said that an agreement of compromise, like any other agreement, may be set aside for what the french law terms *dol*, or want of good faith in either of the contracting parties; and it is alleged that Chandler, by his agent, was guilty of *dol* by mis-

representation of his title, and by using intimidation towards Lavallée. The misrepresentation imputed to him is, that he claimed by his protest, rights as *seigneur* of Nicolet which did not belong to him, and treated as within his *seigneurie* a part of the river which was actually within the boundaries of La Baie; and it is contended, that as he had been for many years the owner of some portions of the *seigneurie* of Nicolet including La Fourche, and had resided within it, he could not have been ignorant either of the boundaries of his *seigneurie* or of the rights which belonged to it; and that, therefore, if his claims where unfounded, he must have known them to be so at the time when he made them. But the proceedings under the act for abolishing feudal tenures in Canada show that upon both these points he might be honestly mistaken. With respect to the boundaries of the *seigneuries*, it appears that when this part of Canada was settled by the french government about the year 1680, the country was waste and uncultivated and for the most part covered with woods, and that any very precise description of boundaries was scarcely possible; that the plan of settlement adopted was to grant a large plot of land to some person as *seigneur*, in order that he might grant it out to tenants, or *censitaires*, for the purpose of cultivation. The grant of the *seigneurie* of La Baie describes the boundary on one side as two leagues in a forest to be measured from the lake of St Pierre, with the isles, islets, and meadows, which might be met with in that space, and it is by means of this measurement that it is made out that this *seigneurie* at the place in question includes the whole channel of the river, though the shore bounding it on the side of Nicolet is within that *seigneurie*. It might well, therefore, when the notice was given, be a matter of doubt whether the whole or part of the stream was not also within that lordship, though at the trial of this cause the fact had been ascertained and was admitted to be otherwise The fact itself was not, perhaps, of any great importance, for the diversion of a stream running through several *seigneuries*, could not be justified simply by the circumstance that the particular place at which the diversion was made belonged to only one *seigneur*. On referring to the maps of Canada, it appears that the Nicolet is a very large river divided by Isle la Fourche into two branches, of which the south-western branch must run through many *seigneuries* besides that of La Baie, and certainly runs along, and probably in part of its course entirely within the *seigneurie* of Nicolet. But the fact (whether material or not) was made out by the title-deeds of the Respondent; he had, therefore, at least equal means of knowing it with Chandler, and there is no more reason for imputing actual knowledge to Chandler than

to him. As to the general feudal rights of the *seigneurs* when they were abolished by an act of the legislature in 1854, a commission, consisting of all the judges, was appointed for the purpose of determining questions which might arise with respect to them. A very large proportion of those questions appears by the proceeding to have related to the rights of the *seigneurs* in non-navigable streams and waters within their *seigneuries*. They insisted that notwithstanding the grant of the lands by them to their tenants, or *censitaires*, they still retained the property in all these waters, and a right to the exclusive use of them for the purpose of mills and manufactories. This claim was not allowed by the commissioners, though it seems to have been in some instances recognized by judicial decision. With respect to mills, it appears that each *seigneur* was bound by law to built a grist-mill within his *seigneurie* for the use of his tenants, that the tenants were bound to resort to such mill, and that no person, except the *seigneur*, was at liberty to built a mill of the same description within the *seigneurie*. These mills were called *moulins banaux*, and if a mill of the same kind were erected within his *seigneurie* by any other person, the *seigneur* had the right to demand its demolition. He also claimed the right of taking back from any *censitaire* a portion of the land included in his grant for the purpose of erecting such mill, making a reasonable compensation. Whether this last claim was well founded or not does not appear to have been decided by the judges under the commission, but it is submitted as a proposition of law by the solicitor-general. Now, Chandler's protest is quite in conformity with these claims; he insists that in his caracter of *seigneur* of Nicolet and La Fourche, he is entitled to all non-navigable streams within the *seigneurie*, and to the exclusive right of building mills and manufactories of all kinds within the same, and he alleges that the proceedings of the Lavallées in erecting the dam and quay within his *seigneurie* were an infringement of his rights. It may admit of doubt whether Chandler's claim to interfere with the works of Lavallée's mill within his (Chandler's) *seigneurie* was entirely without foundation. If the *seigneur* had a right to prevent the erection by his tenant of any grist-mill within the *seigneurie* on the ground that it might interfere with the custom due to his own mill, there seems room for argument that he might prevent the erection within his *seigneurie* of the works of a mill of that description, which might be equally injurious to him though the main building was situate within the limits of an adjoining *seigneurie*. The question, however, is not whether Chandler could have sustained his claim, but whether it was not unreasonable that it

could not have been advanced *bonâ fide*, and we certainly cannot come to that conclusion. It is mentioned in his protest that he had served a notice of claims to the same effect, in the year 1825 on the *Despins*, the then owners of the mill. We feel bound to say that we can discover nothing in this case to support the charge of wilful misrepresentation by Chandler, nor can we find any sufficient evidence of surprise or intimidation of the Respondent. Many months intervened between the service of the protest and the agreement, and there is nothing to show that the Respondent was in any manner under the control or influence of Chandler, or in such circumstances or condition of life as to be subject to intimidation by him. The retrocession obtained from Richard, and the threat by Chandler to build a mill in the *seigneurie* of Nicolet, are in a great measure explained by the state of the law, to which we have adverted, at the date of the agreement, and we think that the engagement by Chandler not to build any mill within certain limits was a substantial concession by him. If, therefore, the transactions were recent and had not been the subject of former discussion, we must hold upon this evidence, that the charge of *dol* brought against Chandler has not been substantiated ; but it must be remembered that, for some time after the agreement was made, it was acted upon by both parties ; that its validity was first disputed in 1852, when Chandler was dead, though Cressé seems to have been living ; that the grounds on which its validity was then disputed were the same as those laid in the present suit ; that the case was decided against the Respondent, and that he acquiesced in the decision. When the present suit was brought Cressé as well as Chandler was dead. Under such circumstances every presumption is to be made in favour of parties whose conduct is impeached after the death of both, and when all the explanations which might be desirable can no longer be afforded. It remains to consider the objection of error in the *motif déterminant* of the agreement. Error on the part of the Respondent is alleged generally both as to matter of fact and of law. In what circumstances error will be a ground for setting aside or refusing to act upon an agreement generally, and an agreement of compromise in particular, and what the nature and effect of the error must be, seems to have perplexed alike judges in England and foreign jurists. The question here is to be determined exclusively by the french law as it is applicable to compromises or transactions. The rule, as we collect it, from the numerous authorities cited in the argument, appears to be this : If the error relied on be in a matter of fact, and the fact, be one not included in the compromise, and of such a character that it must be considered the determining motive of either

of the parties entering into the agreement, its existence is regarded as a condition implied, though not expressed; and then, if the fact fail, the foundation of the agreement fails. This seems to be the meaning of the language used by Toullier, b. 3, tit. 3, sec. 1, art. 42, and following articles. The instances which he puts are, if a compromise be found in the genuineness of instruments which turn out to be forged or if a suit which it is the object of a compromise to determine turns out to have been already decided in favour of one of the parties, or if a compromise be founded upon a will which turns out to have been revoked by another will of which the parties are ignorant. But, he says, when the compromise is general of all matters in difference between the parties, then the rule of law is different, because it is not proved that the compromise would not have taken place, although the parties had known that one of the points was not doubtful. In such a case it is neither proved nor presumed that the compromise would not have taken place, and, in the case of doubt, *l'erreur ne nuit qu'd celui qui était dans l'ignorance.*) The general rule then applies, "*Error nocet erranti.*" We cannot say that in this case any mistake of fact has been proved on the part of the Respondent which, if it had been known, would have prevented the agreement. It is neither proved that Lavallée believed the part in question of the river Nicolet to be within the *seigneurie* of Chandler, nor that if he had known it to be within the *seigneurie* of La Baie he would not have entered into the compromise. It appears to us to have been the intention of the parties to come to a general settlement of all the matters in dispute between them, without resorting to litigation in order to determine the various points of fact or of law upon which their rights might depend. (As to the effect of error in law upon agreements of this description, art. 2052, of the code civil provides, *les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort. Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion.* This article in itself, of course, has no force in Lower Canada, but it is merely an embodiment of the ancient law of France, as is clear from the chapter in Domat's *Civil law*, tit. *Des transactions*, and as is expressly stated by Merlin in the passage relied on by the Respondents in the *Répertoire*, tit. *Transactions*, sec. 5, art. 2 vol. 34, p. 371. He says: *L'erreur de droit ne peut jamais servir de prétexte pour faire rescinder une transaction. Les anciennes lois l'avaient ainsi décidé, comme on l'a vu à l'article "Ignorance,"* § 1; et l'art. 2052 *du code civil dit expressément que "les transactions, ne peuvent être attaquées pour cause d'erreur de droit."*

As a general rule this is not denied by the Respondent. But he contends, that there is an exception where a mistake has prevailed generally with respect to the law, affecting whole classes of the community, and a compromise has been made founded upon such mistake. And it is said, that at the time when this agreement was made, the rights of the *seigneurs* with respect to non-navigable rivers and other waters within their *seigneuries* were universally considered to be much larger than they were afterwards found to be by the proceedings under the commission to which we have already referred, and that this mistake was the foundation of the agreement. In support of the proposition of law, a passage is referred to in Merlin's *Répertoire*, immediately following that which we have just read, and which is in these words: *Si cependant l'erreur de droit avait été tellement générale, que le législateur se fût cru obligé, non seulement de la faire cesser par une déclaration de sa volonté, mais encore de relever ceux qui l'auraient commise, de tous les acquiescements auxquels elle aurait pu les entraîner, la transaction qui aurait été la suite d'une pareille erreur, serait incontestablement nulle. C'est ce qu'a jugé un arrêt de la Cour de Cassation du 24 mars 1807, rapporté au mot "Communaux,"* sec. 4. It is obvious that if an act of legislation correcting a mistake generally prevailing as to the law on a particular subject, at the same time expressly relieves parties who have acted on the mistake from the consequences of their acts, there is no question for a judge to decide; and this is the case stated by Merlin. It is true that the *arrêt* to which he refers, states merely that the party was not bound by acquiescence in a decree arbitral, *puisque l'opinion générale était alors que les décisions d'arbitres forcés n'étaient point attaquables par cette voie*, that is, by way of *cassation*. Neither the general rule nor the particular case (of which the circumstances were very peculiar, and founded on the laws enacted by the revolutionary government of France in the years 1792 and 1793, in favour of the peasants against their lords) goes the length of establishing the principle contended for by the Respondent, that a mistake of law as to rights of different classes prevailing generally at the time of a *transaction*, is sufficient to annul a contract founded upon such mistake. Whether under any circumstances it would be sufficient to do so it is unnecessary for us to consider, because on referring to the proceedings we are satisfied that the facts of this case afford no ground for any such question. On the contrary, a careful examination of those proceedings, as they are stated in the Lower Canada reports with which we have been furnished, convinces us that at the date of this compromise very

great doubt prevailed as to the rights of the *seigneurs* and their tenants respectively to the ownership and the use of non-navigable rivers and as to the right to erect mills, and by means of dams to divert the water to such mills, and that there was no general recognition of the rights claimed by the *seigneurs*. The 37th question put to the commissioners was in these words." What was the jurisprudence followed in Lower Canada since the cession of the country, in relation to the various rights claimed by *seigneurs* in the waters which pass through or border upon the lands comprised in their respective *censives?* The legal proposition submitted on the part of the crown was, that although several judgments favourable to the pretensions of the *seigneurs* on the matter have been pronounced, they are not such as the law requires to establish a jurisprudence, and the opinion of the court is that there has been no established jurisprudence in Lower Canada since the cession, in relation to the right in the waters which pass through or border upon the lands." There is no ground, therefore, in this case for any exception to the general rule that an agreement of compromise is not vitiated by a mistake of either party in matters of law. Upon the whole, we have come to the conclusion, that the judgment of the court below cannot be supported ; that this agreement is to be dealt with upon the principles applied by french law to *transactions;* that the withdrawal of the claim of Chandler to interfere with the dam, and the engagement to limit his right of building mills, constituted a sufficient consideration to support the agreement, and that no such proof has been given either of *dol* or *erreur*, as would authorize a court of justice to annul it. We must humbly advise Her Majesty to reverse the judgment complained of, and to restore the judgment of the Circuit Court, and we think that the Appellants must have the costs in the Queen's Bench, and of this appeal. As this case is to be decided exclusively by the french law, we have forborne to advert to the english authorities upon the subject. But we may observe that in the case of *Stewart* vs. *Stewart*, in the house of lords (6 Cl. and Fin. 911), which was a case from Scotland, a very careful examination took place of the principles to be applied to this subject; and Lord COTTENHAM came to the conclusion that the rules of the civil law had been in effect adopted into the law both of England and Scotland; and this appears to us to have been the case with the law of France. (15 More's, *Privy Council Rep.* p. 270 et 13 *D. T. B. C.* p. 132.)

VENTE D'IMMEUBLE PAR CORPORATION MUNICIPALE.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 2 décembre 1861.

Coram Sir L. H. LAFONTAINE, Bart., Juge en Chef, AYLWIN, DUVAL, MEREDITH and MONDELET, Juges.

LA CORPORATION DU COMTÉ DE YAMASKA, Appelante *et* RHÉAUME, Intimé.

Jugé: Que dans le cas d'une vente de propriétés en vertu de l'Acte Municipal de 1855, pour taxes dues à une Municipalité scolaire par une personne autre que le propriétaire en possession de l'immeuble, tel propriétaire troublé dans sa possession par le nouvel acquéreur peut porter l'action en complainte contre tel acquéreur, sans qu'il soit nécessaire de faire d'abord annuler l'acte de vente. (1)

SAVOIR: Si la même règle serait suivie depuis la passation de la 8ème, sous-sec., de la 64ème sect., cap. 24, des Status Refondus du Bas-Canada.

L'Intimé était, depuis longtemps, propriétaire en possession de la moitié sud-ouest du lot No 28, dans la treizième concession, appelée concession Charlotte, dans la Seigneurie de la Rivière David, lorsque, le 6 février, 1860, l'Appelante la fit vendre pour recouvrer quatre-vingt-neuf cents d'arrérages de cotisation dus à la municipalité scolaire de la paroisse de la Rivière David par Pierre Fafard dit Delorme. Benjamin Thérien, à qui la propriété fut adjugée, voulut, de suite, et de sa propre autorité, s'en mettre en possession. L'intimé étant troublé intenta contre Thérien, l'auteur du trouble, une action en complainte qui fut rapportée le 2 mai, 1860, devant la Cour Supérieure du district de Richelieu. L'Appelante assignée en garantie par Thérien, prit son fait et cause, et opposa à l'action de l'intimé, que, le sixième jour de février alors dernier, Thérien avait acheté l'immeuble en question pour cinq dollars et quatre-vingt-neuf cents payés à Aimé Roy, le secrétaire-trésorier qui avait fait la vente; que cette vente avait été précédée et accompagnée des formalités voulues par la loi; que Thérien en ayant pris possession en vertu de cette vente, l'Intimé ne pouvait l'en déposséder qu'après avoir obtenu un jugement déclarant la vente nulle; que l'Intimé n'avait pas obtenu pareil jugement, et que sa demande était en conséquence mal fondée. A cette exception, l'Intimé répondit que la vente faite à Thérien n'avait pas été accompagnée des formalités requises par la loi; que l'Intimé n'avait jamais été notifié par un avis spécial de payer la somme réclamée par la municipalité scolaire, quoiqu'il fût à la connaissance du conseil municipal de la paroisse de la Rivière David, et de son secrétaire-trésorier, qu'il était pro-

(1) V. art. 1004 C. M.

priétaire et en possession de l'immeuble dont il s'agissait ; que l'Intimé résidait dans la municipalité de la paroisse de la Rivière David, et qu'il y possédait des biens meubles qui devaient être saisis et vendus avant ses immeubles. Le jugement de la Cour Inférieure est comme suit : " Considérant, que le Demandeur principal a prouvé les principaux allégués de sa déclaration. et, nommément, *son droit de propriété* de l'immeuble désigné en sa déclaration, sa possession d'icelui et sa résidence dans la municipalité ; considérant, que le Défendeur principal n'a pas établi les allégués de l'exception péremptoire par lui plaidée, et, nommément, que la vente et adjudication du dit immeuble par Aimé Roy, ès nom et qualité, a été précédée et accompagnée de toutes les formalités voulues par la loi à l'égard d'un contribuable présent dans la localité, renvoie la dite exception péremptoire, et déclare la vente et adjudication *nulle*, et comme *non avenue*, déclare ce dernier légitime *propriétaire* et en possession de la terre désignée comme suit en la déclaration en cette cause, etc." On behalf of Appellant, it was contended that this judgment should be reversed for the following reasons : 1° Because the court below awarded *ultra petita* ; 2° because Respondent never alleged that he was a resident of the parish of St. David, at any time before the 6th February, 1860 ; 3° Because, if any error was committed in the sale of the land, it was so committed owing to the bad faith of Respondent ; 4° Because, by the common and statute law of Lower Canada, the principal Defendant in the court below could not be dispossessed of the lot until after judgment of a competent tribunal pronounced against the municipality, the secretary-treasurer of which received, or was entitled to receive, the purchase money ordering such municipality to repay the same, either with or without damages, or declaring the sale so made null and void. (1) 5° Because no action was ever instituted against the municipality of the parish of St. David, the secretary-treasurer of which received, or was entitled to receive the proceeds of the lot. A perusal of the declaration and of the judgment appealed from, will suffice to convince the court of the necessity of reversing the decision of the court below, inasmuch as the court below could not even grant the conclusion of the declaration, and that, upon a demurrer, the action ought to have been dismissed.

DORION, pour l'Intimé : L'appelante a fait vendre la propriété de l'Intimé en vertu de l'acte municipal de 1855, amendé par les actes de 1856 et de 1857 ; et, par sa défense, elle a restreint la contestation aux seules questions de la

(1) Chap. 24 Con. Stat., L. C., s. 64, par. 8.

régularité et de l'effet de cette vente. La 74e clause de l'acte municipal de 1855, telle qu'amendée par la 25e clause de l'acte de 1856, (20 Vict., chap. 101) autorise les secrétaires-trésoriers des municipalités de comté à faire vendre, pour taxes municipales, les propriétés situées dans leurs municipalités respectives. Les formalités qui doivent précéder la vente des immeubles consistant dans un avis public, qui doit être donné aux contribuables aussitôt que le rôle de cotisation est fait, qu'ils aient à payer sous vingt jours, le montant de leur cotisation. A l'expiration des vingt jours, le secrétaire-trésorier de la municipalité locale, doit donner un avis spécial à personne ou à domicile, requérant chaque débiteur de payer la cotisation et les frais de signification de l'avis, et si, dans les quinze jours après cette signification, le montant n'est pas payé, il peut saisir et vendre les meubles du débiteur en quelque partie de la municipalité qu'il les trouve. S'il y a des débiteurs absents ou qui n'aient point de meubles, le secrétaire-trésorier doit faire, avant le 15 novembre de chaque année, un état de ce qu'ils doivent à la municipalité, en indiquant par les mots "absent" ou "point de meubles" vis-à-vis le nom de chaque débiteur, la raison qui a empêché de prélever la somme due. Cet état est transmis avec une description des immeubles des débiteurs, au secrétaire-trésorier du comté, qui procède à la vente de ces immeubles après avoir donné les avis indiqués dans l'article 11e de la clause 74e déjà mentionnée. En vertu de l'acte de 1857, 20 Vict., chap. 41, clauses 5 et 12, les secrétaires-trésoriers sont autorisés à prélever les cotisations pour les écoles, en même temps que les taxes municipales, et en observant les mêmes formalités. La propriété de l'Intimé a été vendue pour des arrérages de cotisations dus par Pierre Fafard dit Delorme, comme si ce dernier en était encore propriétaire et en possession, et rien ne fait voir que ces cotisations étaient dues à raison de l'immeuble vendu. Il était cependant notoire que l'Intimé en était depuis longtemps propriétaire et en possession. La municipalité de la Rivière David ne pouvait l'ignorer, puisque l'Intimé avait été cotisé pour cette propriété par le rôle d'évaluation fait par les commissaires d'écoles en 1858, et par celui fait par la municipalité elle-même le 4 janvier, 1859. L'Intimé avait, en outre, plus de neuf mois avant la vente, payé à la municipalité une cotisation spéciale pour la construction d'un pont dont cette propriété était chargée. Cette vente a ainsi été faite sur une personne qui n'était ni propriétaire ni en possession, et, de plus, elle n'a été précédée ni de la discussion des meubles de l'Intimé, ni de l'avis spécial requis par la 25e clause de l'acte de 1856, en sorte qu'il n'est pas douteux qu'elle ne soit radicalement nulle. Aussi, l'Appelante n'a pas entrepris de la

justitier. Elle prétend seulement que l'Intimé devait la faire annuler par un jugement d'une cour compétente, avant de se pourvoir contre l'acquéreur Thérien, et elle invoque, au soutien de cette prétention, l'article 8 de la clause 64 de l'acte des municipalités de 1860. (1) Cette clause déclare bien, il est vrai, qu'un acquéreur de terre vendue, soit en vertu de l'acte municipal de 1855, ou des actes subséquents, ne pourra être dépossédé avant qu'une cour compétente ait déclaré la vente nulle et ait condamné la municipalité dont le secrétaire-trésorier aura reçu ou dû recevoir le prix de vente, à le rembourser; mais cette disposition ne s'applique pas à cette cause. L'Intimé avait intenté son action lorsque l'acte municipal de 1860 a été passé. Il avait, par conséquent, acquis le droit de faire juger ses prétentions d'après la loi existante à l'époque où il avait commencé ses procédés, et, pour le priver de ce droit, il aurait fallu par une mention expresse soumettre les causes pendantes aux dispositions de cette 64e clause. Comme toute loi de procédure, cette disposition ne peut qu'affecter les procédés à faire, et non détruire les droits acquis en vertu de procédés adoptés avant sa promulgation. Cette disposition ne s'applique en outre qu'aux actions portées pour déposséder un acquéreur dûment en possession.

MEREDITH, Justice: The Appellants, on the 1st February, 1860, caused the lot of land claimed by Respondent, to be sold for the payment of 89 cents, arrears of school taxes accrued before the year 1858, and due by Pierre Fafard dit Delorme, as having been proprietor of the same lot of land. The notarial deed of sale establishes that Pierre Fafard dit Delorme sold the lot of land to Respondent on the 3rd of March, 1857, and there is nothing to show, or even to lead us to presume, that subsequently to that time, Pierre Fafard remained in possession of the lot, or exercised any rights of ownership in relation to it. On the contrary, the proceedings on the part of Appellants for the sale of the property, were conducted against Pierre Fafard dit Delorme, as an absentee; and, in addition to this, it appears that, in the assessment roll, for the scholastic municipality of St. David, made in 1858, the name of Respondent was put down as that of the proprietor of the lot, and, in the assessment roll of the municipality of the parish of St-David for the year 1859, that being the first year in which an assessment roll was made for that municipality, the name of Respondent was also inserted as that of the owner of the lot. Under these circumstances, it seems unnecessary to enquire whether the forms prescribed by Statute were observed upon the occasion of the sale in question; as

(1) 23 Vict., chap. 61.

that sale, having been made upon a person, who, certainly, was not the proprietor, and who does not appear to have been in possession of the property sold, must necessarily be held null. The Appellants did not rest their case so much upon the legality of the sale made upon Fafard dit Delorme, as upon the want of right on the part of Respondent to question these proceedings in the present case; and, in support of this view, they cited the 8th clause of the 64th sect, of cap. 24 of Con Stat. of L. C., p. 238, which is in the following terms. "And "whereas doubts have arisen as to the mode of proceeding "which should be adopted by any person whose property has "been illegally sold for taxes under the provisions of the said "Lower-Canada Municipal and Road Act of 1855, and the "Acts amending the same, it is declared and enacted, that no "purchaser of land was, or is, under the said Acts, or shall be "under this Act, liable to be dispossessed of the same, until "after judgment of a competent tribunal is or shall have "been pronounced against the Municipality the secretary-"treasurer of which receives or was entitled to receive "the purchase money ordering such Municipaly to repay "the same, either with or without damages, or declaring "the sale so made null and void." The Respondent, on the other hand, contends that his suit, which was pending at the time of the passing of that statute, cannot be affected by its provisions. And, although the terms of the statute are plainly declaratory, and must, in some respects, have a retrospective effect, I nevertheless am of opinion that it ought not to be held to extend to suits pending at the time it was passed. The law on this subject was very clearly laid down by Lord Denman in the case of *Hitchcock* vs. *Way* (1) in which it was held: "that where the law is altered by sta-"tute pending an action, the law as it existed when the action was commenced, must decide the rights of the parties, "unless the legislature by the language used shew a clear "intention to vary the mutual relations of such parties." In the present instance, I do not think that the language used by the legislature does show an intention to vary the rights of the parties in pending suits; and, therefore, I am of opinion that the statute ought to be so interpreted as to exclude such suits from its operation. There is the greater reason for adopting that interpretation, because, if the statute is to be understood as not affecting pending suits, it will not produce an im-

(1) *Hitchcock* vs. *Way*, 6. Ad. and El., p. 951; see also *Doolubdas* vs. *Ramlol* 3 Eng. Law and Eq. Rep., 39: also *the Queen* vs. *Crawan*, 2 Ad. and El., N. S. 221, the foregoing authorities agree, in principle, with the french authorities, cited in Laperrière and Cuthbert, by the learned Counsel for the Reepondent.

justice whatever, for it will not defeat any acquired right, nor destroy, even, any previously existing remedy. It merely requires that a party complaining of a sale made by a municipality, shall cause the question, as to the legality or illegality of the sale, to be determined between himself and the municipality; and that this must be done before the innocent purchaser shall be liable to be dispossessed of the land in dispute. Indeed, if the provision of law under consideration be confined to proceedings instituted after the promulgation of the statute, I do not see that it would be in any way open to objection, for no party can be held to have a vested right in a remedy, until he has availed himself of that remedy. (1) But the case would be very different indeed, if the terms of the statute were such as to compel us to apply its provisions to pending suits for "what but injustice would it be to subject "a man to the loss of his action and the costs of suit, by a "retrospective law; although at the time when he commenced "his suit he was entitled by the established law to recover. (2) For these reasons, I think that the sale in question is null; and that Respondent had a right to avail himself of the nullity in the proceedings before the Court below; and, therefore, that the judgment appealed from, ought to be confirmed.

Jugement confirmé. (12 *D. T. B. C.*, p. 488.)

OLIVIER et ARMSTRONG, pour l'Appelante.

DORION, DORION et SÉNÉCAL, pour l'Intimé.

GARDIEN.

COUR DE CIRCUIT, Arthabaska, 19 novembre 1862.

Présent: STUART, Juge.

FRÉCHETTE, père, *vs.* ST. LAURENT.

Jugé: Qu'un individu constitué le gardien à une saisie n'est tenu de représenter les effets mis sous sa garde qu'à la personne de qui il tient sa charge. (3)

Dans une cause ci-devant pendante devant la Cour de Circuit du district d'Arthabaska, Eustache Houle ayant poursuivi Joseph Fréchette, fils du Demandeur en la cause, fit saisir avant jugement une paire de bœufs à la garde desquels le

(1) *Bigelow* vs. *Pruchard*, 21, Pick, 174; also Sedgwick, same work, 199, 407, 687, 691, 692.

(2) Sedgwick, Constitutional Law, p. 696, and cases there cited: *Bedford* vs. *Shelling*, 4 S. and R., 401.

(3) V. art. 590 et 597 C. P. C.

Défendeur fut constitué gardien, Joseph Fréchette, père, intervint dans cette cause réclamant les bœufs comme sa propriété, et obtint jugement conformément aux conclusions de son intervention. Plus tard, Fréchette, père, ayant fait signifier son jugement sur l'intervention à St. Laurent, lui demandant la livraison des animaux mis sous sa garde, St. Laurent refusant de lui livrer ses animaux avant d'être payés de ses frais de garde, Fréchette, père, intenta une action contre lui, prenant une saisie-revendication des bœufs en question. C'est l'action dont il s'agit. Cette action fut rencontrée par le Défendeur; 1o. Par une défense en droit, par laquelle il niait au Demandeur son droit d'action; 2o. Par un plaidoyer réclamant un droit de retention sur les animaux tant qu'il n'aurait pas été payé de ses frais de garde. La cour débouta l'action du Demandeur, sur le principe qu'il n'y avait aucun contrat entre le Demandeur et le Défendeur, qu'il n'était responsable des effets mis sous sa garde qu'envers celui qui l'avait établi gardien, et que, comme il apparaissait que c'était Houle qui l'avait nommé à la charge de gardien, que c'était à lui seul qu'il pouvait être tenu de remettre les effets saisis, et que, si le Demandeur avait quelque recours à exercer, ce devait être contre Houle, et non contre le Défendeur. Les autorités suivantes furent citées par le procureur du Défendeur au soutien de ses prétentions. (1) (13 *D. T. B. C.*, p. 20.)

PACAUD, Proc. du Demandeur.

DUVAL, Proc. du Défendeur.

TACITE-RECONDUCTION.—VENTE.—FRAUDE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 14 December 1862.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

DUBOIS, Appellant, and RYAN, Respondent.

Jugé: Que, dans l'espèce, l'achat des effets d'une partie saisie, par son beau-frère, était, de fait, pour la partie saisie, nonobstant l'existence d'un bail entr'eux, et que la tacite reconduction dans ce cas de louage de meubles ne pouvait être reconnue de manière à faire présumer une possession à titre de propriétaire, *bonâ fide*, dans la personne de cet acquéreur, vu que le locateur ne faisait pas le commerce de louer des meubles. (2)

On the 5th of February, 1862, Appellant sued out a writ of execution against Calvin P. Ladd, on judgment obtained

(1) Poth: Contr: de Dépot, Nos. 74, 85, 86, 91, 92,: Troplong, Priv. et Hyp. No. 257.

(2) V. art. 1609 C. C.

several years previously, under which he took in execution certain household effects as the property of his debtor. On the 15th of February, Respondent made his opposition, claiming a specified list of the effects as his property; alleging them to have been purchased at a public judicial sale, on the 2nd of November, 1855, under execution, in a cause in the Superior Court, No. 212, Robert Mitchell *vs.* Calvin P. Ladd; that, being proprietor in possession, he had leased them, with other effects, to Defendant, by *acte* before Easton, and his colleague, notaries, of the 5th of November, 1855, and that, at the time of the seizure, Defendant was only possessed thereof as his tenant. Besides the lease, Respondent produced the bailiff's receipt for the purchase. The Appellant contested this opposition, alleging that Ryan was the brother-in-law of Ladd, and employed as his foreman; that he was without means of credit; that the purchase, at the judicial sale, was with Ladd's own money, and in fraud of his creditors; that the property claimed never belonged to Ryan, but always to Ladd; that the lease was fraudulent and simulated; that Ladd was notoriously insolvent, and engaged in defrauding his creditors; and that the lease was insufficient to vest the property in Ryan, the term of it having expired. The following admission, dated April 25th, 1862, was made by the Appellant: "The Plaintiff admits that the effects claimed by "Opposant in this cause are the same as those specified in "the lease from the Opposant to Defendant, and that they "are the same goods seized under the execution in this "cause; and that they are the articles which Opposant "claims to have purchased at a judicial sale of Defendant's "goods and chattels, in the case No. 212, *Robert Mitchell,* "vs. *Calvin P. Ladd,* Defendant, of the 2nd of November, "1855, and are specified in the *procès-verbal* of sale in said "cause as having been adjudged to the opposant." On the 23rd May, 1862, the Court (Badgley, Justice, presiding) rendered judgment maintaining the opposition of Respondent, as follows: "The court, considering that opposant hath established the allegations of his opposition, and that contestant hath failed to establish the allegations of his contestation to the opposition of opposant, doth maintain the opposition, and doth declare the goods, chattels and effects seized under the writ of execution in this cause issued, and detailed in the opposition and the *procès-verbal* of seizure thereof, the property of opposant, and doth order *main levée* to be given to opposant of the seizure of the goods, chattels and effects, and doth dismiss the contestation." From this judgment an appeal was instituted.

MEREDITH, Justice: The Appellant (Plaintiff in the Court

below) having a judgment against one Calvin P. Ladd, caused certain furniture and household effects in his possession to be seized as belonging to him. The Respondent, by an opposition, claimed the effects so seized as having been purchased by him in 1855, at a sale by the sheriff, of the effects of the said Calvin P. Ladd (the Defendant) at the suit of one Mitchell, and it is from a judgment maintaining the opposition so filed that the present appeal has been instituted. The purchase of Defendant's effects, at sheriff's sale, by Respondent, is proved, and, therefore, the controversy between the parties, is, in effect, as to whether the purchase so made by Respondent was or was not fictitious. When the household effects of a Defendant who is insolvent, are brought to sheriff's sale, his relatives or friends have beyond doubt a right, not only to purchase the effects, but to give the use of them to Defendant, gratuitously, or for a consideration, as they may think fit. In this country, where, unfortunately, we have no law for the protection of honest, but insolvent debtors, the friends of such persons acting in accordance with the dictates of humanity, are frequently obliged to interfere in the way I have mentioned, and provided the purchasers make use exclusively of their own means and do not attempt to prevent fair bidding at the sale, there is nothing objectionable in the proceeding. But, however plain it may be that the friends of an insolvent debtor may bid on his effects for him, if they think proper so to do, it is equally plain that an insolvent debtor cannot place his effects beyond the reach of his creditors by causing them to be purchased with his own means in the name of a third party. And, in the case before us, the main question which we have to determine seems to be as to whether the purchase money, on the occasion of the sheriff's sale relied on by Respondent, was provided by Respondent. or by Calvin P. Ladd, the Defendant. In cases of this kind, the means of the purchaser and the relation of the parties to each other are points of importance. I may therefore mention that, at the time of the purchase, opposant and Defendant were brothers in law, and that opposant was a clerk having a salary which, according to his own statement, amounted to about £175 per annum, and that, in addition to this, he made by keeping boarders from £20 to £50 per annum, so that his annual income, at the time, may be set down at about £200 or £225, per annum, and he admits that he had not at the time any other means of living than his boarders and his trade. The following is the account given by Respondent of the purchase in question. "The transaction I made with Ladd was not made to protect Ladd from his creditors: *it was a bonâ fide transaction that I knew nothing of until the day of sale.*

I cannot *now remember where I got the money to pay for the articles bought.* It was to the amount mentioned in the receipt. *It was I think about £76. I did not pay with Mr. Ladd's money.* I do not know where I got the money from. I may have borrowed some, and I may have had some. I do not remember how much money I borrowed, nor from whom. Question. Are you positive that you do not remember who lent you the money? Answer. I think it was Mr. Babcock. Question. Was the understanding between you and Mr. Babcock that you should return that money? Answer. There was nothing said about it at all. Question. Do you know whether he gave it to you or lent it to you? Answer. He lent it to me I suppose." The Defendant Calvin P. Ladd, in his evidence as to the purchase of his effects, says: "I never was aware of Ryan's intention to purchase at sheriff's sale my furniture in question. I asked him if he would purchase it. I had previously asked another party, I think it was Mr. Millard, to purchase it. Ryan, when asked by me, consented to purchase it. I don't recollect what inducement I held out to him to purchase it. *I swear I never spoke to Ryan on the subject of the purchase before that day.* I do not remember whether Ryan *at once consented, or whether I had any difficulty to persuade him to purchase it. I cannot say as to whether he had any doubt as to his ability to get the necessary money.* I did not tell him where to get the money. *I have understood that he borrowed a portion of the money of Mr. Babcock.*" Question. "Have you ever spoken to Mr. Babcock, since the public sale in question of your furniture, about the amount so advanced by him to Ryan?" Answer. "I have not." Question. "Had you previous to the sale in question spoken yourself to Mr. Babcock on the subject, or got others to speak to him?" Answer. "Not to my recollection." Question. "How do you explain Mr. Babcock's advance of the money to Mr. Ryan, and his never asking Mr. Ryan since for the capital or the interest?" Answer. "I do not know that I have any particular explanation to make, as I am not aware of Mr. Babcock's or Mr. Ryan's business matters." Now, it seems to me almost beyond doubt that if Respondent, having a family to support on an income of between £200 and £225, per annum, had actually laid out £76 in the purchase of the furniture of his brother in law, that he would have been able to say how, or from whom, he got the money; and it seems to me equally plain that if, as is now alleged, Respondent really borrowed the money from Babcock, he could not, in his evidence, have said "I do not remember how much money I borrowed, nor from whom." Again, if Babcock had, in truth, lent the money to Respondent it seems to me in the last degree improbable, that,

as Respondent alleges "nothing was said about the return of the money;" or that respondent could have been left in doubt, and for six years remained in doubt, as to whether he had received the money as a gift or as a loan. It is most improbable that, in the case of a man of very limited means, obtaining an advance of £76, from a stranger, that nothing should be said about the repayment of the advance, or that the person receiving the money should be left in doubt as to the nature of the transaction. If Babcock had intended to make a gift of £76, what Respondent and Ladd say would be intelligible; but all the parties represent the alleged advance as a business transaction, and it is in that light that we must view it. The evidence as to the repayment of the alleged loan is as unsatisfactory as that with reference to the making of it; and indeed it is difficult, if not impossible, to reconcile the statements on this subject of Babcock and of the Respondent; Babcock says: "I have not settled accounts with him, but the money I lent him, as above mentioned, will be more than covered by what I have received from him since, he will still owe me a balance, *but not as much as the money I then loaned.* It was understood between us that he was to allow me interest; there have been numerous transactions between us, and whether he still owes me a part of what he then borrowed, depends on the manner in which we settle accounts." Whereas Respondent has said: "It is not to my knowledge that Babcock has ever spoken to myself or to Ladd as to the repayment of the money advanced by him, and to the best of my knowledge the sum remains due in capital and interest *and has always been due.*" Question. "Do you mean, by the best of your knowledge, to qualify a positive assertion, that as far as you know the money is still due and has always been due?" Answer. "I mean that as far as I know it remains due, and nothing *has as yet been paid.*" The whole of the evidence thus adduced seems to me to lead to the conclusion that the money paid for the effects in question must have come from Defendant, who advanced it through Babcock. If this conclusion is not justified by the facts, Respondent might have asked Babcock, his own witness, whether the price of the furniture had been advanced or repaid to him by Defendant. But no such question was submitted. Upon the whole, it appears to me impossible that the evidence could be such as it is, if Respondent had *bonâ fide* purchased the effects in question with his own funds, or with funds obtained on his own credit; whereas the evidence is exactly what might have been expected if the price paid for the said effects, had been furnished by Defendant himself; and my opinion, after carefully considering all the circumstances of the case as proved, is, that

the price paid, ostensibly by Respondent, for the goods in question, was either advanced, or repaid by Defendant himself; and I therefore think that the opposition of Respondent ought to have been dismissed.

MONDELET, Juge: Voici ce dont il s'agit: La Cour de première instance a déclaré, par le jugement dont appelle le Demandeur, que l'Opposant est propriétaire des effets saisis sur le Défendeur. L'Opposant les a achetés à une vente judiciaire. Ensuite il en a fait au Défendeur un bail pour une année. Ce bail n'a pas été renouvelé, et, après plusieurs années, les effets en question étant saisis, l'Opposant les réclame tant en vertu de son titre d'acquisition, qu'en vertu de ce qu'il prétend être une tacite reconduction. Il est de fait qu'il n'y a pas eu de déplacement des effets qui sont toujours demeurés chez Ladd, le Défendeur, sur lequel ils avaient été vendus par autorité de justice. Je concède, et ça été la jurisprudence invariable en ce pays, qu'en fait de vente judiciaire, il n'est pas nécessaire que déplacement ait lieu. Mais si cet acquéreur à une vente judiciaire, veut bien ensuite se placer sur un autre terrain et devenir locatenr, il ne peut réclamer le privilège de la tacite reconduction, qu'en autant qu'il s'est conformé à la loi, en effectuant son bail, et à la rigueur, ce bail a pu valoir, à son avantage, contre les créanciers de son locataire (l'ancien Défendeur et contre qui que ce soit) durant l'année du bail, il ne peut avoir d'effet au-delà de cette année, car la présomption de la régularité et de la bonne foi, entre les parties, ne peut exister ni être invoquée dans une espèce comme la présente, où les effets sont demeurés entre les mains et en la possession de ce Défendeur qui se moque ouvertement de ses créanciers, au risque de ce bailleur qui n'a pas jugé à propos d'accompagner son bail de certaines formalités requises pour le parfaire et lui imprimer le caractère de la légalité et de la bonne foi. Ainsi ne reconnaissant pas qu'il puisse y avoir, dans l'espèce, telle chose que la tacite reconduction, j'opine pour le mal jugé de la cause, et l'infirmation du jugement de la Cour de première instance.

BERTHELOT, Juge: L'Appelant, créancier par jugement du nommé Ladd, fit saisir son mobilier pour la satisfaction de sa créance. L'Intimé se porta opposant en réclamant les effets saisir pour les avoir achetés en 1855 à une vente judiciaire faite sur Ladd à la poursuite de Mitchell, le 2 novembre 1855. L'Intimé et Ladd étaient beaux-frères lors de cette vente judiciaire en 1855. Les effets sont toujours restés depuis lors en la possession de Ladd comme locataire d'iceux, en vertu d'un bail notarié daté du 5 novembre 1855, Easton, notaire. Il n'y a jamais eu d'autre bail. C'est en invoquant cette vente et ce bail pour prouver sa propriété que l'Intimé a soutenu son op-

position, contestée par l'Appelant en articulant que la vente du 2 novembre 1855, avait été payée des deniers de Ladd, et que l'Intimé n'était pas un adjudicataire sérieux et qui était devenu réellement et de bonne foi l'adjudicataire de ces effets. Toute la preuve fait assez voir que cette vente, et tout ce qui l'a précédée et suivie, était un arrangement entre Ladd et Ryan pour mettre les effets du premier à couvert de ses créanciers. Dans un pareil cas, lorsque la sincérité des parties est mise en question, ainsi que leurs transactions, il faut que l'adjudicataire puisse établir que le paiement a été fait de ses deniers, lorsqu'on conteste la légalité et l'efficacité de son titre, et qu'on le met en demeure de faire cette preuve. Or, il résulte des dépositions de Ladd et de Ryan, et elles en laissent assez voir pour que l'on doive croire que ce ne sont pas les deniers de ce dernier qui ont acquitté la vente des effets qui a eu lieu le 2 novembre 1855, mais que ce sont, au contraire, les deniers de Ladd ou de personne interposée par lui et pour lui. Cela étant, cette vente devait être déclarée frauduleuse, ou au moins simulée, comme n'ayant conféré à l'Intimé aucun droit de propriété quant aux effets qui en ont fait l'objet, et par conséquent l'opposition aurait dû être déboutée. Mais, indépendamment du mérite de la transaction en elle-même, le jugement serait encore mauvais et en contradiction de celui qui a été rendu par l'honorable juge Smith, le 31 mars 1859, dans la cause de *Bell* et *Rigney*, et *Milne* opposant, rapportée dans 7 *R. J. R. Q.*, p. 398 : 1° "That *tacite reconduction*, in relation to moveables only arises, only when the lessor is a dealer and makes a business of letting moveables ; 2° that lessees of moveables, when the lessor is not such a dealer, remaining in possession after expiry of lease, will be deemed to hold as owners." Ce jugement fut confirmé purement et simplement par la Cour d'Appel, par jugement du 1er mars 1860. Il me semble que nous ne pourrions méconnaître ce jugement qui est un précédent que l'on devrait suivre, à moins que l'on ne démontre qu'il consacre une erreur, ou qu'il a été rendu pour d'autres raisons que celles de la Cour Supérieure. Ce qui n'a nullement été prétendu par l'Intimé ni dans son factum ni à l'argument, quoique l'Appelant ait invoqué cette décision tant par son factum que lorsque la cause a été plaidée devant cette cour.

THE COURT : Considering that, by the evidence adduced Respondent hath failed to establish that, at the time of the seizure made in this cause of the goods, chattels and effects set forth in the *procès-verbal* of seizure he Respondent was the owner of the goods, chattels and effects, or of any part thereof, and that, in the judgment pronounced by the Superior Court on the 23rd day of May, granting to Respondent

mainlevée of the goods, chattels and effects, there is error, this court doth reverse, annul and set aside the judgment so pronounced by the Superior Court on the 23rd day of May, 1862, and proceeding to pronounce the judgment which the Superior Court ought to have pronounced, this court doth dismiss the *opposition afin de distraire* filed by present Respondent. (13 *D. T. B. C.*, p. 21.)

BARNARD, for the Appellant.

CROSS, for the Respondent.

BILLET EN BREVET.—PRESCRIPTION.

COUR DE CIRCUIT, Joliette, 16 novembre, 1863.

Coram C. J. LABERGE, J. A.

MARTIN GRAVELLE *vs.* LOUIS BEAUDOIN.

Jugé: Qu'un billet notarié en brevet payable à ordre n'est pas prescriptible par cinq ans.

La poursuite était basée sur un billet passé devant Desauniers et collègue, notaires, le 30 octobre, 1855. Le Défendeur plaida la prescription de cinq ans, et cita les causes de *Morin* vs. *Legault*, Crevier *vs.* Sauriole et de *Lavoie* vs. *Crévier*.

PER CURIAM: Des précédents cités, il n'y a que ceux de la Cour de Circuit qui soient applicables, et ces précédents étant, dans l'opinion de la cour, en conflit avec le droit du pays, qui est le droit français, même en matière de commerce, excepté en ce qui concerne la preuve, il faudrait que la Cour d'Appel eût finalement prononcé sur cette question pour faire prévaloir la jurisprudence sur ce que cette cour considère comme un point de droit bien établi. L'exception de prescription est déboutée. (7 J., p. 289.)

MELANÇON et BEAUPRÉ, Avocats du Demandeur.

G. A. CHAMPAGNE, Avocat du Défendeur.

PRESCRIPTION D'UN BILLET NOTARIE.

COUR DE CIRCUIT, Montréal, 13 novembre 1863.

Coram BERTHELOT, J.

LACOSTE *vs.* CHAUVIN.

Jugé: Qu'un billet notarié reçu en brevet n'est pas prescriptible par cinq ans.

Cette action fut instituée le 15 mai 1863, pour $45.36 basée sur un billet reçu en brevet devant notaires, le 27 février,

1856, et payable à la Toussaint 1857. Le Défendeur plaida la prescription de cinq ans, établie par la s. 31 du ch. 64 S. R. B C. La cour malgré différentes décisions dans le sens du Défendeur rejeta cette exception remarquant que, dans son opinion, cette clause du statut ne devait s'appliquer qu'aux simples billets promissoires ordinaires, et non aux billets passés en brevet devant deux notaires. Jugement pour le Demandeur. (7 *J.*, p. 339.)

JODOIN et LACOSTE, pour le Demandeur.

DENIS et TRUDEL, pour le Défendeur.

BILLET EN BREVET.

BANC DE LA REINE, EN APPEL, Montreal, 7 mars, 1865.

Présents: DUVAL, Juge-en-Chef, AYLWIN, MEREDITH, DRUMMOND et MONDELET, Juges.

SEGUIN DE LASALLE, Appelante, *et* BERGEVIN, Intimé.

Jugé: Qu'un billet notarié en brevet n'est pas soumis à la prescripiton de cinq ans, etablie par le Stat. Ref. pour le Bas-Canada, cap. 64. (1)

L'action portée devant la Cour Supérieure, à Montréal, était pour le recouvrement du montant de deux reconnaissances devant notaires, en brevet, par un nommé Lormand, en faveur de Ernest Boullenois, mari décédé de l'Appelante, et dont le Défendeur se porta caution solidaire. La première de ces deux reconnaissances, en date du 24 juillet, 1854, était pour £25, pour valeur reçue, que Lormand s'obligea de payer au créancier, ou *à son ordre*, dans deux mois. La seconde reconnaissance, en date du 15 janvier, 1855, était pour £26 5, pour valeur reçue, en argent prêté, et payable au dit Boullenois, ou *à son ordre*, le 18 août, 1855. Dans ce dernier acte, le Défendeur se porta caution conjointement avec un nommé Hénault. L'Appelante déclarait qu'il avait été payé $50 sur la première obligation, et réclamait, comme balance, en principal et intérêt sur cette reconnaissance, $69.68, et la totalité de la deuxième, savoir: $160.05. Le Défendeur plaida que ces deux reconnaissances, qu'il désignait comme *des billets*, étaient prescrites suivant les dispositions du Statut, dont la section 31 est ainsi conçue: " et *tous billets*, dus et payables dans le Bas-Canada, " etc., seront censés absolument payés et acquittés, si une pour- " suite ou action n'a pas été intentée dans les cinq ans qui sui- " vront le jour où ces billets sont devenus dûs et payables;" et dont la troisième section porte que " tout billet payable à

(1) V. art. 2260 C. C.

" l'ordre du faiseur ou du tireur, sera considéré comme négo-
" ciable, et sera transférable par endossement régulier ou en
" blanc, ou par délivrance, etc."

Le 24 mars, 1864, la Cour Supérieure rendit le jugement suivant: "La Cour renvoie la réponse en droit à l'exception
" de prescription plaidée par les Défendeurs, maintient la dite
" exception de prescription, et, en conséquence, déboute cette
" action."

GIROUARD, for Appellants: Comme l'Intimé paraît, par le texte même de son exception, attacher une importance exagérée, sur le fait que les billets, dont le paiement est demandé, sont faits *à ordre* et causés pour *valeur reçue*, l'Appelante croit d'abord devoir remarquer que ces mots ne sont pas de l'essence d'un billet promissoire. (1) La question simplifiée se présente donc dans la forme suivante: *L'obligation notariée, communément appelée billet en brevet, est-elle un billet promissoire, prescriptible, par conséquent, par cinq ans?* Il ne paraît pas que, dans l'ancien droit français, on ait entretenu quelque doute sur ce point. Il est vrai qu'il n'y avait que les brevets et billets de change qui fussent sujets à la prescription de cinq ans établie par l'Ordonnance de 1673, et que les autres billets, soit simples ou à ordre, et sous seing privé, se prescrivaient par trente ans, comme toutes les autres actions personnelles. Cependant, il n'est pas moins étrange que les auteurs, qui ont traité de la lettre de change, tels que Pothier, Jousse, de la Serra, Savary, Rogue et quelques autres, ne fassent aucune mention des lettres de change notariées ou des billets en brevet *négociables*, puisque l'ordre était requis à peine de nullité par l'Ordonnance. Nous aurons bientôt occasion de tirer argument de cette espèce de silence tenu par les anciens auteurs à propos du billet notarié, et de faire voir qu'il n'existe que parce que c'était pour eux un principe élémentaire qu'un billet et une lettre de change étaient des écrits privés et non authentiques. Ce n'est que sous l'empire du Code, que les commentateurs ont fait une question de cette règle. Merlin paraît être le fondateur de la nouvelle doctrine; et plusieurs, entraînés par l'autorité de son nom, ont répété avec lui qu'une lettre de change aussi bien qu'un billet négociable (l'ordre étant requis par le Code) pouvaient être passés devant notaire et même en minute. Avec cette maxime vague: *ce que la loi ne défend pas elle le permet*, ils ont même

(1) Voir sur les mots: "à ordre," 2 Savary, pp. 587, 578, 606; Lavoie et Crevier, décidée en Appel le 7 juin, 1859; Sur les mots: "pour valeur reçue," 2e vol. du Journ. des Audiences, p. 287; 2 R. J. R. Q., p. 138; Stevens vs. Lyman, No. 2589, jugée à Montréal le 25 octobre, 1848, : Hart vs. Macpherson, 31 janvier, 1848, même Cour: 12 Vict., ch. 22, sec. 2 et 3e, et S. du C. de 1890, 53 V. ch. 33, s. 82.

voulu reconnaître tous les caractères du billet négociable dans une obligation *à ordre* et en minute, emportant hypothèque, et aussi dans un acte de vente d'immeuble, avec promesse d'en payer le prix *à terme et à ordre.* Il n'est pas hors d'utilité à la cause de l'Appelante de citer les observations de Merlin sur ce sujet. Elles feront voir en effet le danger qu'il y aurait de s'écarter de la règle, qui a invariablement été maintenue jusqu'à ces derniers temps; car si l'acte notarié en brevet peut dans notre droit être ou devenir un billet promissoire ou une lettre de change, ces deux effets étant placés sur le même pied par notre Statut, quelle raison empêchera qu'un acte en minute, emportant même hypothèque, ne le soit pas aussi, comme le soutient Merlin. (1) Telles sont les raisons qui ont engagé des jurisconsultes aussi éminents que Duvergier, Massé et Pardessus, (2) à adopter l'opinion de Merlin, raisons qui n'ont pu cependant convaincre les tribunaux et arrêter la jurisprudence. Cette doctrine en effet a rencontré des adversaires non moins nombreux ni moins distingués que ses Défenseurs. Pardessus même lui a d'abord été fortement opposé dans son *Contrat de Change* p. 62, No 69: "La lettre de "change," y dit-il, "est ordinairement un acte sous signature "privée. Quoique la loi ne s'en soit pas formellement expli-"qué, l'usage qui, lorsqu'il est général et reconnu, est tou-"jours sous entendu dans les dispositions des lois, comme "dans les conventions des particuliers, a consacré des for-"mules de lettres de change, qui semblent exclure leur "rédaction par l'entremise d'officiers publics. Nous ne "devons pas toutefois dissimuler qu'un jurisconsulte dis-"tingué par ses talents autant que par le rang qu'il occupe "dans la Magistrature (M. Merlin, V. *Let. de Change,* § 2, No "7), pense qu'une lettre de change peut être faite par acte "devant notaire, La jurisprudence de la Cour de Cassation "pourrait seule décider cette question d'une manière irrévo-"cable, et nous ne connaissons pas d'arrêts qui l'aient jugée "Au surplus, il est certain qu'on peut valablement stipuler par "acte devant notaire, le double consentement par lequel un "individu recevrait de quelqu'un une somme et s'obligerait "d'en faire trouver une autre dans un lieu indiqué; mais ce "ne serait pas une lettre de change. Quand même on stipule-"rait que les droits résultant de cette convention pourront "être cédés par la simple voie d'ordre, ce transport ne produi-"rait pas les effets de l'endossement des lettres de change." D'un autre côté, il paraît difficile à Troplong d'admettre l'exécution notariée des lettres de change et de billets. Voici ses

(1) Répertoire de Jurisprudence, vol. 7, pp. 419, 420.

(2) 2 Dr. Com. No. 330.

réflexions à ce sujet: (1) " La question de savoir si un billet " à ordre peut se faire dans la forme notariée est décidée affir- " mativement par M. Merlin et par M. Pardessus. Cependant " on peut soulever contre cette opinion de graves objections, " dont les principales ont été développées par M. Dalloz dans " la plaidoirie dont nous avons parlé tout à l'heure. Les déno- " minations de BILLET à ordre, de LETTRE de change, d'ENDOS- " SEMENT n'indiquent-elles pas un écrit sous seing privé et " circulant en original. N'excluent-elles pas l'idée d'un écrit " authentique ? L'endossement peut-il être autre chose qu'un " transport sous seing privé apposé sur le dos de l'original " même ? J'avoue que ces objections me paraissent graves." Cette belle plaidoirie de Dalloz sur la nécessité de la signature privée d'un billet se trouve en son *Recueil Périodique*, 1833, p. 354. " Nous disons d'abord," dit-il, "qu'un billet à ordre et " une lettre de change n'admettent pas l'intervention d'un no- " taire. C'est, en effet, la première idée qui se présente, et elle " se confirme aussitôt par la lecture des différentes dispositions " du Code de Commerce, et des discussions dont elles ont été " précédés dans le sein du Conseil d'Etat. Ces expressions de " lettres de change, de billets à ordre, de porteurs, de lettres " de change égarées ou perdues, employées sans cesse, soit dans " les articles du code, soit dans les discours des orateurs, ex- " cluent manifestement toute idée d'un billet à ordre ou d'une " lettre de change passés devant notaire, au moyen d'un ins- " trument dont il reste minute et dont les copies ou expédi- " tions peuvent être indéfiniment multipliées, même après le " paiement de la dette. En vain dirait-on, en s'armant de l'opi- " nion de M. Merlin que, si nulle part on n'a prévu la possibi- " lité d'une lettre de change ou d'un billet à ordre notariés, " nulle part la loi n'a interdit de donner à ces actes la forme " authentique, à l'aide de laquelle des négociants illettrés peu- " vent souscrire de semblables engagements pour les besoins de " leur commerce. Le billet à ordre et la lettre de change sont " des actes d'une nature spéciale et exceptionelle, dont la loi a " pris soin de déterminer les formes, et si ces formes repoussent " l'idée d'un contrat notarié, il faut dire qu'elle a par là même " virtuellement proscrit la forme notariée pour ces sortes " d'actes. Quant à l'avantage d'offrir aux négocians qui ne " savent pas écrire la facilité de souscrire des engagements de " cette nature, il est bien peu sensible, puisque, dans tout le " cours de sa longue carrière, M. Merlin déclare n'avoir vu " qu'un seul exemple d'une lettre de change passée devant " notaire; et, d'ailleurs, cet avantage est plus que balancé, soit " par les inconvénients inhérens à l'existence de la minute et

(1) *Traité de la Vente*, p. 403, vol. 2.

" à la possibilité d'obtenir et de faire circuler des expéditions " nouvelles après l'acquittement de la première, soit par le " danger d'initier à ces sortes d'obligations, qui emportent des " sanctions si rigoureuses, une foule de petits marchands ou " même d'habitants illettrés des campagnes qui ne sauraient " pas toujours mesurer la portée de semblables engagements." Puis le savant jurisconsulte passe à d'autres considérations encore plus graves sur les conséquences de l'opinion favorable à l'endossement des actes emportant hypothèque. Malgré l'importance de la question, qui nécessitait un arrêt final pour amener les tribunaux inférieurs à une jurisprudence uniforme, la Cour de Cassation n'a pas cru devoir se prononcer dans la cause que plaidait Dalloz. Comme il l'observe, soit qu'elle ait été touchée des difficultés que cette jurisprudence pourrait susciter, soit qu'elle ne l'ait pas trouvée suffisamment fondée sur le texte et sur l'esprit de la loi, soit enfin qu'elle ait pensé que le jour n'était pas encore venu où les habitudes sociales en réclameraient impérieusement l'application, elle s'est en quelque sorte arrêtée tout court devant son œuvre. Une fin de non recevoir, et peu digne, suivant lui, de l'être, a détourné ses méditations, et elle a permis de renvoyer à un autre temps le problème qui lui était proposé. Nous ne croyons pas qu'il ait été résolu depuis. Cette discussion, soulevée en France, sous l'empire du Code, doit, ce nous semble, être d'un grand poids dans le jugement de cette honorable Cour en faveur de l'Appelante. Quoique dans les espèces proposées par Merlin, Dalloz et autres, il s'agisse de lettre de change et de billet notariés, portant minute, la question de la forme authentique de ces actes, lorsqu'ils sont passés devant notaires en brevet, n'y est pas moins considérée et examinée avec cette science qui distingue les jurisconsultes français; et si la doctrine de la possibilité d'une lettre de change ou d'un billet notarié trouve auprès d'eux de puissants défenseurs, il ne faut pas perdre de vue qu'elle paraît être appuyée sur les articles du Code de Commerce, qui, en parlant des qualités essentielles de la lettre de change et du billet, n'a rien statué sur la forme de ces actes, laissant ainsi, dit-on, les parties libres de choisir celle qui leur plairait. Mais, dans ce pays où nous n'avons aucune loi écrite sur l'essence et le caractère de ces actes, où tout est régi par la Coutume Marchande et le Droit Commun, on comprend que l'on ne peut invoquer le silence du législateur et en déduire la même conclusion. En Bas-Canada, comme dans l'ancien Droit Français, il n'existe jusqu'à l'année 1859 aucune décision favorable à la prescription quinquennale des billets en brevet ou à leur négociabilité; on les a toujours considérés comme de simples obligations. Ce n'est qu'à l'occasion de la cause de Morin *vs*

Legault dit Deslauriers, (1) M. le juge Smith siégeant, que la question a été soulevée. Il s'agissait dans cette espèce d'un billet en brevet à ordre et endossé, lequel endossement a été reconnu comme légal. Plus tard, en 1862, le même juge maintenait un plaidoyer de prescription à l'encontre d'une action sur un billet en brevet *au porteur*, (2) et enfin, en 1864, dans la présente espèce, il maintenait une semblable exception, qui est celle invoquée par l'Intimé. D'un autre côté, d'autres décisions contraires ont été rendues par différents juges. Dans la cause de *Gravelle* vs. *Beaudoin*, (3) Son Honneur M. le juge-assistant LABERGE remarquait : " Des précédents cités, " il n'y a que ceux de la Cour de Circuit qui soient applicables, " et ces précédents, étant dans l'opinion de la Cour en conflit " avec le droit du pays, qui est le Droit Français, même en " matière de commerce, excepté en ce qui concerne la preuve, " il faudrait que la Cour d'Appel eût finalement prononcé sur " cette question, pour faire prévaloir la jurisprudence sur ce " que cette Cour considère comme un point de droit bien éta- " bli. En conséquence la Cour déboute l'exception de prescrip- " tion. " Plusieurs jugements dans le même sens ont été prononcés par les honorables juges BERTHELOT et LORANGER, et nous croyons être dans la vérité en affirmant que tous les juges de la Cour Supérieure, à l'exception de Son Honneur le juge Smith, partagent cette dernière opinion. Au milieu de ce conflit d'opinions et de décisions opposées, il paraît difficile d'adopter une règle sûre et certaine. Il semble, cependant, qu'il n'y a pas à douter, et qu'il faut dire que, suivant le caractère et le rôle de la lettre de change et du billet promissoire, la doctrine des anciens auteurs français, l'esprit et le texte même de nos lois, ces effets excluent la forme authentique. Les dénominations de LETTRE, BILLET, ENDOSSEMENT, ACCEPTATION, FAISEUR, ENDOSSEUR et PORTEUR, consacrées par l'usage et nos statuts, n'indiquent-elles pas un écrit sous seing privé, destiné à circuler de main en main comme une pièce de monnaie ou un billet de banque, qui lui aussi est un billet promis-

(1) Une obligation faite sous croix en brevet devant notaires par laquelle le débiteur, pour valeur reçue, reconnait devoir une somme déterminée qu'il promet payer, dans un délai mentionné, au créancier ou à son ordre, est un billet promissoire qui peut être transporté par endossement. *Morin* vs. *Legault dit Deslauriers*, C. C. *Montréal*, 17 février, 1859, *Smith* J., 7 R. J. R. Q., p. 360.

(2) Une obligation passée en brevet devant notaires, par laquelle le débiteur, pour valeur reçue, reconnait devoir une somme déterminée qu'il promet payer à demande au créancier ou au porteur est un billet promissoire pouvant être transporté par endossement et est sujet à la prescription de cinq ans à compter de la date. *Crevier* vs. *Sauriole dit Sansouci*, C. C., *Montréal*, 27 mai, 1862, *Smith* J., 10 D. T. B. C., p. 336.

(3) *Suprà*, p. 221.

soire ? Qui a jamais pu raisonnablement prévoir que ces actes inventés pour le commerce, d'une nature spéciale et exceptionnelle, que les gens d'affaires souscrivent si fréquemment et avec cette rapidité qui préside à toutes les opérations commerciales, pouvaient subir les longueurs et le luxe d'une rédaction notariée, comme celle des deux actes dont l'Appelante poursuit le recouvrement. Evidemment, on comprend que quand les parties prennent le temps et le trouble de se rendre chez un officier public, quelquefois à distance, elles entendent faire une toute autre convention que celle qu'elles-mêmes auraient pu si facilement exécuter sans aucune assistance, ni intervention. Et cette idée que chacun se forme d'un billet promissoire n'est pas imaginaire ou simplement naturelle ; elle est un fait. On la retrouve dans des actes mêmes souscrits par l'Intimé en faveur de l'Appelante, qu'il qualifie d'*obligations*, portant intérêt du jour de l'échéance, non de plein droit comme dans le cas du billet promissoire, mais par la stipulation des débiteurs. Cette idée, on la retrouve encore en toutes lettres dans les registres de nos Cours ; et, pour s'en convaincre, il suffirait de descendre dans les greffes ; nous y constaterions des centaines de cas, où les prétendus privilèges de la négociabilité ou de la prescription statutaire du *billet en brevet* n'ont jamais été invoqués et n'ont pu l'être en conséquence des idées reçues sur la forme du billet promissoire ; idées qui sont cause qu'aujourd'hui plusieurs créanciers sont encore porteurs de semblables titres, qui se trouveraient prescrits, si elles étaient fausses. Ces idées reçues suffisent, à notre avis, pour constituer un usage général, constant et reconnu, qui, comme l'observent les auteurs, quand la loi ne s'explique pas, est toujours sous entendu dans les dispositions des lois comme dans les conventions des particuliers, et fait loi en l'absence de telles dispositions. Le billet en brevet n'est pas un acte de commerce mais du droit civil, et on ne pourrait dans ce cas-ci prétendre qu'il peut le devenir à raison de la considération originaire ; car c'est un prêt d'argent fait à des non commerçants. Pourquoi alors permettre à ces derniers d'invoquer une prescription qui n'a été introduite que pour les affaires de commerce. Au reste, les lois du pays ne sont pas tout-à-fait muettes sur la question qui nous occupe. Le langage qu'elles nous tiennent est assez précis pour ne pas mettre en doute l'intention du législateur. Que signifient, en effet, ces dispositions des anciennes ordonnances françaises, de la déclaration du 15 mai, 1703, de l'édit du mois d'octobre, 1705, etc., portant que, dans toute action en juridiction consulaire sur lettre de change ou billet négociable (l'ordre étant, en effet, requis par l'Ordonnance de 1673), il ne serait pas nécessaire de procéder à la reconnaissance judiciaire requise dans le cas d'action sur simple promesse, billet et autre

écriture sous seing privé ? Quel est donc, en particulier, le sens de la section 86e du chap. 83 des Statuts Refondus du Bas-Canada, déclarant que dans toute action sur *lettre de change ou billet, cédule chèque écrit ou promesse, ou autre acte ou marché par écrit sous seing privé*, les signatures seront considérées comme vraies, *primâ facie ;* et cette autre clause (113e) du même statut, permettant de prendre jugement en vacance, et par défaut, dans toute action basée sur " *toute lettre de change, billet, promesse* ou *autre écrit* sous " *seing privé,*" si ce n'est qu'il est de l'essence d'une lettre de change comme d'un billet que ces effets soient rédigés et signés sous seing privé. Les anciens auteurs français ne sont pas moins précis. Bornier, *Conférences des Ordonnances*, vol. 2, p. 548, s'exprime ainsi : " Les lettres de change," dit-il, " constituent un ordre particulier *parmi les actes sous signature* " *privée*, et lorsque l'on a par quelqu'édit ou déclaration assujetti les actes sous seing privé à quelques formalités, les " lettres de change et les billets à ordre ou au porteur en ont " été exceptés." Ferrière, Dictionnaire de Droit, vbo. *Billet*, définit ce dernier une promesse de payer par écrit sous signature privée, et au mot *brevet* il appelle la promesse de payer passée devant notaire *obligation en brevet*. Pothier, *Traité des Obligations*, No 608, fait évidemment une distinction entre un billet et un acte notarié comme ceux qui font la base de la demande de l'Appelante. Il y appelle ces derniers *Brevets d'Obligations*. Rogue, *Jurisprudence Consulaire*, vol. 2, p. 138, fait la même distinction. Ferrière, Grand Coutumier, vol. 1er, p. 1335, sur l'article 89, dit que le " billet est une promesse " de payer une somme de deniers, écrite de la main du débiteur, que les jurisconsultes appellent *chirographum* ou *privatum crediti instrumentum*." (1) Et si l'on considère la nature de l'acte en brevet, on reconnaîtra aisément que ces notions sont d'accord avec les principes du droit ; si l'on considère, disons-nous, que cet acte est aussi authentique que celui en minute, qu'il est aussi permis que ce dernier, sauf dans quelques exceptions prescrites par les lois, qu'il doit être revêtu de toutes les formalités exigées pour les actes en minute, faire mention de la demeure, des noms et prénoms des parties, lorsque l'acte des billets promissoires ne demande que les initiales des prénoms, et enfin que de l'aveu de tous, l'obligation en minute ne se prescrit que par trente ans, il est impossible de voir la raison de différence qui rendrait l'obligation en brevet prescriptible par cinq ans seulement. S'il nous est permis encore de consulter le Droit Anglais, nous y trouverons un puissant argument à l'appui de notre thèse. Parsons, on

(1) *Instructions Faciles sur les Conventions*, pp. 233-236.

Notes and Bills, vol. 1, p. 26, nous apprend en effet, "*that an* " *instrument under seal*, though in all other respects in the " form of a promissory note, is according to the best authori- " ties, not negociable, and possesses none of the qualities of ne- " gociable paper," parce qu'en effet un acte sous le seing et le sceau des parties est une *specialty*, et qu'il est revêtu des formes les plus solennelles qui existent en Angleterre. Or le billet en brevet n'a-t-il pas la forme la plus authentique qui soit reconnue dans notre pays? Le Droit Anglais qui fait loi ici, en l'absence de dispositions formelles, n'empêche-t-il pas en conséquence qu'un billet en brevet soit un billet promissoire, prescriptible par cinq ans ?

DOUTRE, Q. C. : Cette question de prescription se présente pour la première fois d'une manière directe devant cette cour. Dans les cours inférieures, elle a été contradictoirement décidée. Certains juges, trouvant dans ces billets en brevet le caractère de l'authenticité donné par le notaire, ont assimilé ces billets à la généralité des reconnaissances notariées, qui ne sont prescriptibles que par 30 ans. D'autres juges, pénétrant au-delà du caratère extrinsèque de ces reconnaissances, n'ont vu, dans l'acte du notaire, qu'une *forme* et non une substance, différente des reconnaissances ou des billets sous signatures privées; et ne trouvant dans les dispositions de notre loi statutaire aucune distinction, quant à la forme des billets, ils ont appliqué la prescription de cinq ans à cette espèce de billets. Le ch. 64 des Statuts Refondus du Bas-Canada, sect. 31, dit: " et tous billets, dus et payables dans le Bas-Canada, etc., " seront censés absolument payés et acquittés, si aucune action " n'a été intentée dans les cinq ans qui suivront le jour où ces " billets sont devenus dus et payables." La sect. 3, dit: " tout " billet payable à l'ordre du faiseur ou tireur, sera considéré " comme négociable, et sera transférable par endossement ré- " gulier ou en blanc, ou par délivrance, etc." La sect. 30, dit que toute partie à un billet sera considérée commerçant. Quels qu'aient pu être les embarras des jurisconsultes, sous l'opération de l'ancien droit français, en matière de billets, embarras créés plutôt par les conflits de juridiction et de compétence des tribunaux civils et consulaires, que par la nature même des contrats ou par leurs formes, notre statut est conçu en termes si positifs, qu'il laisse peu d'occasions de faire revivre les débats qui ont existé en France. Notre loi dit: *tous billets* seront censés acquittés après cinq ans. Ces termes sont absolus et sans distinction; et pour repousser cette prescription de cinq ans, il faudrait trouver dans la forme notariée et authentique un obstacle aussi absolu que les termes du statut. " BILLET," dit Merlin, *Rép.*, vo. *Billet*, " c'est, en général, la recon- " naissance d'une dette, avec la promesse de la payer." Voilà

ce qui constitue la substance d'un billet : la reconnaissance d'une dette et la promesse de la payer. La forme sous laquelle cette reconnaissance et cette promesse sont constatées ne tient pas à l'essence ni à la nature du contrat. Cette forme ne peut avoir d'importance que lorsque l'on en vient à considérer le plus ou le moins de facilité que le porteur de telle reconnaissance et de telle promesse peut avoir de négocier l'effet qui les comporte. La négociabilité de l'effet consiste : 1° dans la faculté du créancier de se dessaisir de sa créance, sans requérir l'intervention d'un notaire ; 2° dans la faculté du débiteur d'éteindre le titre qui existe contre lui, en redevenant possesseur de l'effet, soit par paiement ou autrement. Nous trouvons ces divers caractères dans le billet notarié, mais en brevet et fait à ordre. Dans la diversité des arrêts de nos cours, sur ce genre de billets, on verra bientôt que la prépondérance est acquise aux prétentions de l'Intimé. 7 *Jurist.*, pp. 339 (*supra* p. 221) et 289, (*supra* p.) on voit que les honorables juges Berthelot et Laberge ont nié à ces billets leur caractère négociable, en autant toutefois qu'il s'agit de la prescription de cinq ans. 3 *Jurist.*, p. 55, *Morrin* vs. *Legault*. (7 *R. J. R. Q.*, p. 360) L'honorable juge Smith avait décidé que ces billets étaient transférables par simple endossement. 6 *Jurist.*, p. 257, *Crevier* vs. *Sauriole*, (*Supra* p. 227.) Le même juge avait appliqué la prescription de cinq ans à ces billets. 9 *L. C. Rép.*, p. 418, *Lavoie* et *Crevier*, (7 *R. J. R. Q.*, p. 304). Cette honorable cour a été plus loin que M. le juge Smith dans l'interprétation et l'application de notre statut sur les billets. Là, il s'agissait d'un billet sous signature privée, mais non négociable, c'est-à-dire, qu'il n'était ni à ordre ni au porteur, et cette cour l'a déclaré prescrit par cinq ans. Or, quelle différence y a-t-il entre un billet sous seing privé et un billet en brevet, si ce n'est que cette dernière forme supplée à l'incapacité des personnes qui ne savent pas écrire, ou même place l'authenticité des signatures à l'abri de tous débats ? Hors de ces deux effets, il est impossible de signaler une différence légale entre les deux formes sous lesquelles la reconnaissance et la promesse peuvent être faites.

MONDELET, Juge : L'action en Cour de première instance était fondée sur un billet en brevet, passé pardevant deux notaires. Le Défendeur plaida la prescription de cinq ans. Cette exception a été rencontrée par une réponse en droit. Il paraîtrait que bien que les parties aient été entendues en droit et au mérite, l'action a été déboutée sur le plaidoyer de prescription de cinq ans. De fait, le jugement *maintient la dite exception de prescription, et, en conséquence, déboute cette action avec dépens.* Je n'ai aucun doute quant à la question. Un billet en brevet, reçu devant deux notaires, n'est pas du tout un billet de la catégorie de ceux à l'encontre desquels existe, par

statut, la prescription de cinq ans. Sous ce rapport, je partage entièrement les opinions des Juges BERTHELOT, LORANGER et LABERGE, qui ont jugé dans ce sens, et je pense, par conséquent, que le jugement dont il est question est mal fondé en loi. Il me semble que la Cour d'Appel doit renverser le jugement du 24 mars, 1864, et renvoyer le dossier à la Cour de première instance pour y être procédé à rendre tel jugement au mérite que la Cour avisera. N'y eût-il, pour justifier ce renvoi que l'absence d'un motivé quelconque sur le mérite de la cause, dans le jugement dont est appel, il y en aurait assurément bien assez. Mais, de fait, il paraît évident, que le savant Juge n'a pas jugé le mérite de la cause, et c'est qu'il est nécessaire qu'il fasse.

Le jugement en appel est motivé comme suit: "La Cour, considérant que le document sur lequel repose l'action des Demandeurs en Cour de première instance, appelants en cette Cour, n'est pas un billet dans le sens de la loi de ce pays, à l'égard duquel la prescription invoquée en cette cause puisse s'appliquer; considérant, par conséquent, qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal, le 21 mars, 1864, cette Cour casse, annulle et met de côté le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance eût dû rendre, il est adjugé et ordonné que la réponse en droit à l'exception de prescription soit et elle est par les présentes maintenue, et l'exception de prescription déboutée, et que tous les procédés en la Cour Inférieure, depuis et compris le dit jugement, soient, et ils sont par les présentes, mis de côté, et il est de plus ordonné que le dossier soit remis à la Cour Inférieure, pour y être procédé suivant qu'il appartiendra. (16 *D. T. B. C.*, p. 415; 8 *J.*, p. 94 et 15 *D. T. B. C.*, p. 438.)

GIROUARD, pour les Appelants.

DOUTRE et DOUTRE, pour l'Intimé.

ATTACHMENT BEFORE JUDGMENT—AFFIDAVIT.

COURT OF QUEEN'S BENCH, Montreal, March, 1864.

Coram DUVAL, C. J., MEREDITH, MONDELET, BADGLEY Justices.

JOHN HEUGH *et al.*, (Plaintiffs in the court below), Appellants, and John ROSS *et al.*, (Defendants in the court below), Respondents.

Held : The omission of the words " before us " in the *jurat* of an affidavit for an attachment against goods sworn to before the prothonotaries of the Superior Court for the district of Montreal, is a fatal irregularity, and a writ of attachment before judgment issued on such an affidavit will be quashed upon motion. (1)

This was an appeal from a judgment rendered in the Superior Court for the district of Montreal. The action had commenced by a writ of *saisie-arrêt* before judgment issued on an affidavit, of which the following are the essential portions: " Patrick John Traquair, of the city of Montreal, merchant, being duly sworn on the holy evangelists, deposeth and saith: that John Ross and George Templeton, both of the city of Montreal, Merchants, Co, partners, carrying on business at Montreal aforesaid, under the name, style, and firm of Ross and Templeton, are justly and truly personally indebted to John Heugh *et al.*, Plaintiffs, in a sum exceeding forty dollars, currency, to wit in the sum, of £1021 0 4 sterling, for (here is set up the ground of debt at length) then follows: " That the deponent is the agent and attorney, duly appointed, of the said Plaintiffs, and hath been credibly informed and hath reason to believe, and doth verily and in his conscience believe, that the said Defendants are immediately about to secrete their estate, debts and effects, and to make away with the same with intent to defraud their creditors, and especially the said Plaintiffs, and that without the benefit of a writ of *saisie-arrêt* to seize and attach the goods, credits, and effects of the said Defendants, in their possession, the said Plaintiffs may be deprived of their remedy and may lose their debt and sustain damage; and Deponent hath signed." (Signed,) P. J. TRAQUAIR. Sworn and acknowledged at Montreal, this 28th day of October, 1862. (Signed,) MONK, COFFIN & PAPINEAU, P. S. C." On the 17th November, 1862, Defendants, by their counsel, moved that the writ of attachment, *saisie-arrêt*, and the seizure and attachment made thereunder, and all the proceedings taken under the said writ be quashed aud set aside. The principal reason set forth in the motion was the irregularity in the jurat of the affidavit, viz., the omission therein

(1) V. art. 834 C. P. C.

of the words "before us." Here are the remarks made by Justice MONK on the 21st November, 1862, in rendering the judgment in the Superior Court: The ground of the motion which has alone attracted the attention of the court is that the *Jurat*, which is in these terms is insufficient: "Sworn and acknowledged at the city of Montreal, this 28th day of October, 1862" signed Monk, Coffin and Papineau, prothonotary, S. C., without saying "before us" I hold this omission to be fatal, and the attachment must be quashed. The judgment of the Court below was as follows; "The court, doth grant the said motion with costs, in consequence, doth quash, set aside, vacate and declare null and void the said writ of attachment saisie-arrêt in this cause issued, and the seizure and attachment made thereunder, and all proceedings of the sheriff or his bailiff under such writ or in respect of such seizure and attachment."

ROBERTSON, A., for Appellants: "The only point upon which the judgment in the Court below was based, as stated by the learned judge in rendering the judgment, was that, in the *jurat*, the words 'before us" should have been inserted. The sole authority cited was the English case of *Graham* vs. *Ingleby*, (1 Exchequer Reports, p. 651) wherein affidavit signed by a *Commissioner*, without the words "before me" was declared, during the argument, to be fatal. The point decided arose under the statute 4 Ann. c. 16, sec. 11, which provides, "that no dilatory plea shall be received, unless the party "offering such plea do by affidavit prove the truth thereof," but the Plaintiff was held to have waived this by joining issue, so that the formality of the *jurat*, was not the point decided. The *dictum*, even if available as a precedent here, which it is respectfully submitted it cannot be, is not applicable to the case of the Prothonotary of the Court, and to an affidavit taken under our Provincial Statute. A more reasonable rule is laid down (4 Ad. and Ell. p. 611) where it is said, "the general rule is, that where a duty is performed by "a public officer he is presumed to have discharged it right-"ly." The court will give credit to *its own officers* that they have observed all proper forms in taking the affidavit, (7 Dow and Ry., p. 514) where Abbott, C. J., is reported to have said, "we may trust the certificate of our own officer, that the "deponent was sworn to the truth of the affidavit," and in the same case (4 B. and C. p. 360,) "I think the *jurat* contains "sufficient matter from which *the Court may reasonably infer* "that this affidavit has been duly sworn." It has been the constant practice for the prothonotory of the Superior Court, at Montreal, to take not merely affidavits but depositions in causes at Enquête, in the way done in the case now in appeal. The court will not presume the affidavit that the officer of

the court certified, an affidavit not sworn before him, nor indeed would the words "before us" be in strictness applicable to a case where one of three officers alone receives an affidavit which is sworn *before him*, although certified by the three officers constituting the prothonotory of the court. Total number of depositions examined in 28 causes in 1862 and 1863, taken at random, in which the words "before us" or before me" were not found, 286; total with the words "before us" in 1862, 27; total with the words "before us" in 1863, 34; total, 61; total with words "before us" struck out in 1862, 19; total with words "before us" struck out in 1863, 4; total, 23; 84. Out of twenty affidavits for *capias* and attachment before judgment, all sworn before the prothonotary of the court, the following was the result: Number with the words "before us" in *Jurat*, 11; number with the words "before me" in *Jurat*, 5; number without either the words "before us" or "before me", 4; total, 20. As well might it be pretended that the initials "P. S. C." constantly used in practice might mean something else than prothonotary of the Superior Court. Even in England, where technical accuracy is insisted upon with a strictness unknown here, and which is repugnant to our system, an affidavit before a "Comr," is held sufficient without giving the word in full or adding words or initials to shew of what Court he is a Commissioner. (7 Dur. and E. Term Rep. p. 451; 4 C. B. p. 321); and, in case of an affidavit sworn before a judge, the words "before me" are not held to be necessary, (13 Mee. and W. p. 519,) the court recognizing the signature of one of its members, as in this case it will recognize and has constantly recognized the signature of the prothonotary. The other objection raised in the motion, but which was noticed by the judge, namely, that without the benefit of an attachment the Plaintiffs *may* lose, instead of *will* lose their debt, has never been brought before this court, so far as can be gathered from our reports. It is an objection which has been decided upon adversely to the Respondents' pretensions in the case of *Shaw* vs. *McConnell*, before C. J. BOWEN, and Justices DUVAL and MEREDITH. (1)

(1) Par la s. 10 du ch. 4 des ordonnances du Gouverneur et du Conseil Législatif du Bas-Canada de 1787, 27 Geo. 3, il était décrété "that no process of attachment, except in the case of the *dernier équipeur* according to the usage of the country shall hereafter be issued for attaching the estate, debts and effects of what nature soever, of any person or persons whomsoever, whether in the hands of the owner, the debtor, or of a third person, prior to trial and judgment; except there be due proof on oath (to be endorsed on the writ of attachment) to the satisfaction of one of the Judges of the Court issuing the same, that the Defendant or proprietor of the said debts and effects is indebted to the Plaintiff in a sum exceeding ten pounds, and is about to secrete the same, or doth abscond, or doth suddenly intend to depart from the province with an intent to defraud his creditor or creditors, and that the Defendant is

Even in the case of a *capias* it was held. 4 *R. J. R. Q.* ,p. 480. " that it was not necessary to make oath that the Plaintiff " without the benefit of a writ of *capias ad respondendum* against the body of " the Defendant, may be deprived of his remedy." It has been thought necessary, from the amount involved in the cause, and for other reasons not now of record, to bring the judgment under the notice of this court, in order to test the sufficiency of the affidavit, and to have it decided whether the strict technical rule, as laid down in the english case cited, and which refers to commissioners named under the english statute (29 Chs. II, ch. 23) can reasonably be insisted upon under our jurisprudence as based upon our statutes.

MEREDITH, J., *Dissentiens*: This case is distinguishable from the English case of Graham and Ingleby, (1) cited in support of the judgment of the Court below, because, in that case, the affidavit was taken before a commissioner; whereas, in the present case, the affidavit was taken before the prothonotary; who, under our law, had exactly the same powers as a judge, with respect to the taking of the affidavit in question. The fact that the power in question, which formerly was vested exclusively in the judges, is now vested concurrently in the Judges and Prothonotaries, is of great importance with respect to the English precedents which have been cited; because it is certain, under the English decisions, (2) and was admitted by the Counsel, and the Bench, in *Graham* and *Ingleby*, (3) that an affidavit, taken before a judge, could not be held bad on account of the jurat not containing the words " before me." Bearing in mind then, as we must do, that, as to the matter under consideration the Prothonotary has exactly the same power as a judge, it would be unreasonable to say that a *jurat* in certain words, would be good, if written by a judge, but bad if written by a prothonotary, having, as to the taking of the affidavit, the same power as a judge. Passing now from the English precedents which have been cited, and viewing the case according to the general principles of our own law, it seems to me that the maxim " *Omnia præsumuntur rite et sollemniter esse acta,*" is applicable in the present instance;

then indebted to the Plaintiff and he doth verily believe that he should lose his debt or sustain damage without the benefit of such attachment." Il a été jugé, sous ces dispositions, qu'un affidavit contenant l'allégation suivante: " by means whereof without the benefit of a writ of *saisie-arrêt*, to attach the estate, debts and effects of said A. B. M., this deponent *may* lose his debt or sustain damage " est suffisant. *Shaw* vs. *McConnell*, c. s. *Québec*, 4 février 1854, *Bowen* J. en C., *Duval* J. et *Meredith* J. 4 R. J. R. Q., p. 62.

(1) Welsbey, Harlstone and Gordon, 651.

(2) 13 Meeson and Welsbey, p. 519, Empy and King.

(3) 1st Welsbey, H. and G., pp. 653, 655.

and that we must presume that the affidavit, which the Prothonotary has certified as having been "sworn and acknowledged," was so sworn and acknowledged before himself; as otherwise he could not legally have certified it as he has done. Indeed it seems to me that it would be as reasonable to object to a *jurat*, for not stating expressly *by whom* the affidavit or deposition was sworn, as for not stating *before whom* it was sworn; and, yet, I believe, it has never been contended in our Courts that a jurat could be held bad for not expressly mentioning, *in the jurat itself by whom* the affidavit was made. Although not expressly mentioned in the jurat, it is rightly presumed that the oath, certified in the jurat to have been taken, was so taken by the deponent mentioned in the body of the affidavit or deposition to which the jurat is attached; and in like manner it is to be presumed that the oath, certified in the jurat to have been taken. was administered by the officer signing the jurat. It has, however, been said that the supposed defect in the jurat would make it impossible to convict of perjury the person making the affidavit, even if it were false. But I do not see that the form of the jurat could be material in a prosecution for perjury. If the officer could prove that the oath was properly administered, that would suffice although the form of the jurat might be defective; and if the prothonotary could not prove that the jurat was properly administered, the fact of his having made a good jurat would not help the case. For these reasons, I am of opinion that the judgments of the court below setting aside the attachment, on the grouud of irregularity in the jurat of the affidavit, ought to be reversed.

BADGLEY, J.: This difficulty arises from an alleged omission in the *jurat* of the affidavit taken by the prothonotary of the Superior Court for the issue of the attachment in this cause. The omission complained of is the want of the words *before us* above the signature of the officer. The affidavit was taken by the prothonotary under the authority of the 46th section of the Cons. St. of L. C. cap. 83, which enacts that no process of attachment shall issue except there be proof on oath made before a judge of the Superior Court, or before the prothonotary of the Superior Court, or before a clerk of the Circuit Court. This section gives authority to the prothonotary or clerk aforesaid, which neither had otherwise to take the affidavit required in such case: to that extent only has a statutory change in the law been made, and the affidavit being duly taken before either officer, the writ issues of course. In the same manner under the 53d section, a commissioner to take affidavits, etc., having first previously received before him the oath or affidavit required to be made, may issue his warrant,

etc. In all this there is really no more judicial power given to the prothonotary or clerk than to the commissioner, and the taking of the affidavit, whether by the prothonotary, clerk or commissioner, is merely ministerial, and thereupon the attachment issues of course. Our affidavit has been borrowed from English precedent, and the rulings upon the question which prevail in England may be safely adopted as our legal guide here. Now to the affidavit itself there are two persons, the one who swears to the contents, and the other the judge, officer or commissioner before whom it is taken. The act of the receiver of the affidavit is a very important part of it, and should be perfect in shewing both *the jurisdiction of the party administering the oath and also in certifying that it had been administered before him.* As regards himself the knowledge of his jurisdiction is personal or self-contained ; as regards others, that knowledge can only be communicated in the certificate which he gives officially of the affidavit having been taken before him by the authentication under his official signature shewing that the oath or affidavit was so taken before him. In 1 New Sessions cases, p. 370, *Regina* vs. *Inhabitants of Bloxham*, Mr. Justice Coleridge held "that the omission was not an irregularity simply; but went clearly to the jurisdiction of the commissioner, being of the very essence of the swearing; "and M. Justice WIGHTMAN said, affidavits must be sworn before a person authorized to take them, the jurisdiction must appear on the face of the affidavit. In 2 New Sessions cases, p. 346, *Regina* vs. *Inhabitants of Wooking*, it was held that the jurat without the words *before me* was bad. Indeed an affidavit without these words in no way indicates its having been actually taken before the officer. In England, this preciseness is not required in affidavits taken before judges. It is usual to uphold affidavits signed by judges there without those words, because, by the common law, judges are always considered *in curia*, and as acting in this respect judicially. No statutory authority is required by them to receive or take affidavits; and the Chief Baron, in 13 Mees. and W. p. 519, said, " although in the case of an affidavit sworn before a commissioner, the omission of the words *before me* may be objectionable, we think it is not so here : this form of jurat has been invariably used, and we are unwilling to question its validity. And Baron Parke said, " the form of the jurat is in conformity with the invariable practice." In that case the jurat was *sworn at my chambers*, etc. The common law has attributed to the judges in England as our law does here to our judges power and jurisdiction in legal proceedings to take affidavits independant of statutory authority, and the practice of courts has recognized

their official signatures as assurances that those legal documents were taken before them. Apart from the judge, no person or officer has legal authority to take affidavits and to administer oaths in civil matters, except by statute, and therefore prothonotaries, clerks of Courts, and commissioners appointed to take affidavits are in the same category in this respect, and cannot take affidavits without that power be given to them by law. In these offices, the duty in this respect is not a judicial office, the Court practice, which recognizes the judge's signature, does not extend to them; and when they shall have administered the oath it is essential that their delegated jurisdiction should be shown expressly in their jurat under their official signature, to have been exercised before them. It was observed in England, in one of the cases in this connection as follows: "Now there is no rule more wholesome and proper than that the jurat of an officer should state that which is essential to its validity, namely, that the affidavit was taken before a party who had proper authority to administer the oath, and did do so; without these there is a defect of jurisdiction, etc. It has been observed that the power to take the affidavit given to the prothonotary is not judicial, and in taking it he is no more assimilated to the judge than the commissioner who is empowered not only to take affidavits, but also himself to issue the warrant of attachment, and yet in the case of the latter, his omission in this respect would unquestionably be fatal to the affidavit; why not equally so in the case of the prothonotary? The necessity of showing substantially in affidavits not taken before the judges of the Court that they were taken before the proper authority has been settled in England. The signature of the judge to the jurat is conclusive there by the practice of the Courts, but the current of authorities does not equally recognize the signature of other delegated officials to affidavits, as sufficient to conclude the fact that they were taken before them unless by their jurat they certify the fact. It is not alone *the perjury of the person making the affidavit* that is to be considered, but also the *misfeasance of the official delegate certifying to what might not have been done before himself.* The Appellants in their factum have labored to show a Court practice here contrary to the necessity of using the words in question, but their legal statistics are clearly against themselves. Now the depositions above referred to cannot be taken into account at all, in this controversy, because they are all taken, or presumed to be taken, in open Court in the presence of the judge, and as a portion of the judicial proceedings in the record of the pending cause; therefore, as regards them the practice of the Courts has invariably sustained them as judicial proceedings,

and in conformity with the invariable practice independent of the addition or omission of the words "before us." But the affidavits above referred to are more legitimate examples in this controversy, and yet of the above number of 20 given, 16 had the words "before me" or "before us" inserted, and only four were without them. As mere practice cases, therefore, the figures are strongly against the pretensions of the Appellants, as four-fifths to one-fifth. This appeal, therefore, under these circumstances should not be maintained. Judgment confirmed. (13 *D. T. B. C.*, p. 32, et 8 *J.*, p. 96.)

A. & W. ROBERTSON, for Appellants.

ROSE & RITCHIE, for Respondents.

PREUVE.—PRODUCTION DE DOCUMENTS RELATIFS AUX AFFAIRES DE L'ETAT.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 18th January, 1863.

Before AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

GUGY, Appellant, and MAGUIRE, Respondent.

Un juge de première instance ne peut contraindre le secrétaire provincial de produire des documents relatifs aux affaires de l'état, si leur production serait dangereuse au service public; et cette question doit être déterminée, non par le juge, mais par le secrétaire provincial ayant la garde des documents.

La livraison des papiers en question en cette cause, à l'Appelant, par un assistant secrétaire, ne privera pas le chef du département du pouvoir dont il est revêtu par la loi, quant à la production de l'original.

MONDELET, Justice, *dissentiente :* The Appellant, Plaintiff in the court below, having sent to the government a complaint against Respondent, touching certain acts of delinquency which he alleged had been committed by Respondent, in the course of an inquiry instituted by him, as superintendent of police of the city of Quebec, Respondent met the charge by an answer, a part of which, Appellant pretends, is a gross libel upon him. The Respondent's answer was communicated to Appellant by order of the government, in an official manner through the assistant provincial secretary for Lower Canada. The Appellant conceiving that the answer in question was a libel upon his character, brought an action against Respondent, and the case came up before a special jury. The Appellant, in order to make out his case, summoned the Hon. Charles Alleyn, provincial secretary, by a *subpœna duces tecum*, thereby requiring him to bring up with him, and produce in court, at the trial, the original of the answer of Respondent, to Ap-

pellant's complaint. The secretary objected producing or exhibiting the original in his possession, pretending that it would be be injurious to the public service. On the *ipse dixit* of the honorable secretary, the learned judge who presided at the trial (TASCHEREAU) maintained the secretary in his pretensions. The Appellant was, in consequence of that decision, deprived of the means of proving his case, and the jury being instructed by the court to that effect, found for Defendant. The Appellant moved for a new trial, but was there again defeated. He now appeals in error, to this court. I have paid the important questions which are now to be solved by this court, a good deal of attention, and I am free to say, that I have thought and thought upon the subject, and turned it over in my mind often and often, before committing to writing the few observations which follow. I am also free to add, that the privilege claimed by the secretary, then one of the members of the executive council, has been so solemnly and so earnestly asserted, as one justified in every respect, that not only have I made it a duty to go over the cases cited, and specially that of Home and Bentinck (1) in the exchequer chamber, but I have tried to bring myself to a belief, that there was something plausible in the pretension of the then secretary of this province; I have however altogether failed in doing so. Before I come to the case of Home and Bentinck, I have to say, that, as to the present, I mean our case, it requires neither law nor decisions, to lead us to a sound conclusion. This pretension in a member of the government to silence the judge on the bench, to prevent the judge from adjudicating *en connaissance de cause*, in one word, to be the tribunal, the *sole* tribunal that has a right to decide as to the obligation to exhibit the original, and thereby prove the copy delivered by the government, or the right, I rather should say, the physical power of refusal, this pretended privilege, I maintain, must be founded on some very great principle of public interest, since secrecy, *necessary* secrecy, appears to be the element introduced into this strange system of privileged communication. Well, is it not more than contradictory, is it not an outrage to reason, to pretend that what has been made public by the government is to be, at the will of that same government on the *ipse dixit* of one of its component parts, the Secretary of the Province, taken and declared by a Court of Justice, to be a secret? and is it not something worse even than that, for a member of the government, a Provincial Secretary to say, I cannot, or rather, I will not let the Court know, nor the jury, what is now public and what has been made public through the department of the government,

(1) *English common law reports*, vol. 6, p. 68 and seq.

whereof I am the constitutional head ? Is there any thing more preposterous than the pretence that such a circumstance which is now a matter of public notoriety, should be attempted to be kept out of the knowledge of the court and jury, why ? because the provincial secretary tells the Court, that if he were to repeat what the government has thought proper to reveal to the whole world, it would be injurious to the public service ? Now, to speak seriously of such a pretension is difficult; still it is plain that could such an exhorbitant privilege constitutionally be claimed in any given case, the right so to do has been waived, and never in the present case could be enforced. I now take another view of the case. By the Imperial Act of 1774 (1) it is solemnly enacted that: "In all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said province by his Majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreably to the said law and custom of Canada, until they shall be varied or altered.... &c." It is by our own Legislature, that the alteration is to be made, and until then, *all causes* are to be determined agreably to the law and customs of Canada. It therefore follows, that, unless, in our law, an exception is found, every Court is bound to recognize and enforce the rule that there is no such privilege, and that, after the government have been the means, the vehicle of the libel being made public, it shall not be permitted to refuse, before a Court of Justice and a jury, to exhibit the original which proves it. Where will it be found, that, because Respondent is a functionary appointed *during pleasure*, by the Executive, he is to be screened from the consequence of having, as is alleged by Appellant, assailed and defamed his character and reputation ? Where will it be found that, after the libel has been made public by the government, a member of that government, the head of the department that gave publicity to that libel, may, on his mere *ipse dixit*, thwart the just claim of any one, before a jury, and set up a privilege which has no existence any where but in his own opinion ? The existence of such an extraordinary privilege, would be a most unjust exception to the law of this country. Let such an exception be found in our laws, and then I say the Court below was right in sustaining the objection. If no such exception be found, then I maintain that the Court below was wrong. I will be told that such a question is not to be decided by our laws, but by the English

[1] Quebec Act, 14, Geo III, ch. 83, sect. 8.

law. The answer is at hand: our law is to be the rule, the Imperial Statute of 1774 is formal. An essential part of those laws, is that he who causes damage to another, is open to an action for the reparation of that damage. The law of England! What law can you cite to override a solemn Imperial Statute? none. Decisions, precedents! Why! three or four precedents which have no bearing upon the present case, sufficient to destroy the most sacred rights of the citizens guaranteed to every one in Lower Canada by the Quebec Act! It is sufficient to express such a pretension, to shew its utter unsoundness. As to precedent, every one knows that any doctrine might by that means be accepted as a true one, were we to search English judicial history. They have had enough of that in England, and some judges have had a dire experience of it. I am not disposed to lock up the law, especially an Imperial Statute so important to us as the Quebec Act of 1774, and substitute to it, a few precedents, precedents, moreover, which are foreign to the questions now under discussion. Surely, I may be permitted humbly to entertain the opinion expressed by such a man as D'Aguesseau; a pigmy ought not to shrink when he finds himself agreed upon such a vital principle, with a giant. "Quelque prévention que j'aie pour ce qui a paru juste au plus grand nombre des juges, j'avoue que ces raisons font peu d'impression sur mon esprit." (1) I must be permitted to say that the decision given by Chief-Justice Dallas, in the Exchequer Chamber, as the organ of the court, confirming the judgment of the Chief-Justice of the King's Bench, in the case of *Home* and *Bentinck*, appears to me to be altogether untenable. Either the court of inquiry was a regular court, or it was not. If it were not, no such privilege could attach to it; if it were a regular court, all its proceedings were public proceedings, and the privilege of withholding part of them, could not, for an instant, be entertained. The reasons given by Chief-Justice Dallas, have not even the semblance of a logical argument, and I am surprised that it is cited here as an authority. I view it as the expression of a very erroneous opinion, a most illogical opinion, which I am not to take my law from, and much less, base my judgment upon. As I have already remarked, the other precedents have no bearing on the present case. Now let us, for a few minutes, look at the present case calmly, and test it with the assistance of reason and Justice. Will it not be seen, at once, that if the pretensions of the secretary were sustained, any one might send to the government the most atrocious libel against any individual, and the character and the reputation

(1) D'Aguesseau, t. 9, Lettre 66, p. 120.

of assailed individual, would thus, with impunity, be destroyed in the eyes of a dozen of ministers, if they did not make public the libel, by delivering a copy thereof to the injured individual? And, in case, as in the present instance, they had made it known and public, by communicating it, as in justice and duty bound, to the person complained of, or rather the person who had complained it being the intended answer to his petition, they would screen the libeller, before a Court of Justice and a jury, by means of a peremptory refusal to produce the original, because, forsooth, it would not suit Mr. secretary so and so, who would be allowed thus to defy the authority of the court, prevent the truth from reaching the jury, and stop the legitimate course of the administration of Justice, by merely saying that it would be injurious to the public service or prejudicial to public interest! Might not well, in the event of such a doctrine being sustained, the words of Mr. Evans in the Home and Bentinck case, properly be applied here, "the character of every indivi-"dual in the country is at the mercy of the government." It has been pretended, as in the case of *Home* and *Bentinck*, that it is necessary for the interest of the public, that secrecy should be had in such and similar matters. I shall content myself with offering as an answer to such a flimsy pretension those other words of Mr. Evans, "necessity is "always a suspicious argument, and never wanting to sup-"port the worst of measures." Such a decision, as well as three or four others which are cited, have no bearing upon the present case. The cases cited were those of papers originating with complainants, here it is the answer to a complaint, wherein it is alleged a libel is to be found against the complainant. In the former case, there may be some plausibility, though no sound reason in the refusal; in the latter, there is neither reason, nor justice, nor even plausibility. I can not, I ought not, for a moment as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine, a doctrine which prostrates to the ground that liberty, that protection to life, honor, property, and to civil and religious liberty, which this country has so much right to boast of, too valuable to be thus thrown away and scattered to the four winds of Heaven! A doctrine which reduces the judge on the Bench to an automaton, who like the statue of Don Juan, will bend at the bidding of any reckless politician, whatever shade of politics or party spirit it may be his misfortune to be tainted with, or of any unprincipled member of society, whoever he is or may be, who is desirous of, or has interest in being screened, or of screening others, from the responsability his misdeeds have subjected

them to. If that doctrine be law, or rather, were law, it would be appalling, it would be such, that no one would feel himself secure. I cannot, I must not assent to it. It is not law, it is unconstitutional, it is tyrannical, it is monstrous; and it must more glaringly appear so, when we come to reflect that an attempt is made to give it currency, and to fasten it on the judges of the land, under constitutional responsible government. Such a pretension reminds me of what was so often done in France, under the old *régime*, by means of the maxim *then* looked upon as sacred by the government. The following will much better than I could myself, illustrate this branch of the subject: " Vainement les Parlemens et les autres Cours souveraines élevaient une voix courageuse contre cet intolérable abus; la Cour ne répondait qu'en lançant de nouvelles lettres de cachet, ou par cette maxime, qu'il ne faut pas soumettre à l'inspection des tribunaux le secret de l'administration et l'exécution des ordres du Roi: d'où l'on concluait qu'il n'existait aucun recours contre les ordres donnés par ses ministres." (1) If the maxim or the privilege which is here sought to be enforced by Respondent, or rather by the Provincial Secretary, be recognized as legal, where will be the protection, the recourse of any one whose character and reputation may happen to be assailed in the way Appellant pretends that his character and reputation have been slandered? True, we have no *lettres de cachet* in Canada, so far as individual liberty is concerned, but we would have all the practical working of such machinery, and indulge in the refinements of such *douceurs*, when honor, character and reputation were at stake. The libeller would have a very easy way to secure impunity, when complained of by a petition to the government, and the petition communicated to him: Instead of confining himself to a defence, a legitimate one, he might safely venture upon the most libellous and calumnious aspersions of his adversary. And then, woe to him, his right to sue the calumniator would not be denied, but the means of proving his case would be refused. It has been very properly said by an eminent writer: "*les hommes honnêtes aimeraient mieux mourir, que de vivre déshonorés.*" I beg leave now to remark, that it appears to me very strange that an attempt should thus be made to effect in Canada, under constitutional government, what in the *an VIII*, was carried out with an iron hand by the despot Bonaparte, by means of such a maxim as to secrecy, which was of immense use to him and which I am not disposed to lend myself to implanting in Canada. The provisions I allude to, is: " Que les agents du gou-

(1) Toullier, t. 1, No. 213, pp. 184 et 185.

vernement ne peuvent être poursuivis pour les faits relatifs à leurs fonctions, qu'en vertu d'une décision du Conseil d'Etat." " Or," says Mr. Toullier, " sous le nom d'*agents* du Gouvernement, on comprenait depuis les premiers fonctionnaires publics jusqu'au plus vil agent de la police, jusqu'au dernier commis des droits réunis; et le Conseil d'état, donnait si rarement l'autorisation nécessaire, (note : à moins qu'il s'agit de punir un maire trop indulgent envers les conscrits) on étendait si loin ce qu'on appelait les faits relatifs aux fonctions des agents du gouvernement, que la demande d'autorisation nécessaire pour les poursuivre, ne faisait ordinairement qu'attirer de nouveaux désagréments à ceux qui avaient le courage et les moyens de la former." (1) Let us have a little more of what, under the French Government, which surely no one, here, thinks of comparing to the British Government, in so far as the knowledge and practice of constitutional principles are concerned, let us, I say, have a little more of that, in the way of illustrating the position taken by Respondent, or rather by the Provincial Secretary : " Nous avons souvent entendu désirer une loi qui abroge l'art. 75 de la constitution de l'an VIII, et qui rende à tous les citoyens la libre faculté de poursuivre en justice réglée les atteintes portées à leur liberté ou à leur sûreté, même par les agents du Gouvernement. Nous croyons avoir prouvé qu'il n'est besoin ni de loi ni d'ordonnance, si les tribunaux, si les cours, pénétrés de leur devoir, ont le courage de repousser, comme n'étant fondée sur aucune loi, l'exception de tout agent du Gouvernement, qui voudrait opposer encore à son adversaire le défaut d'autorisation du Conseil d'état, et de se faire, sous l'empire de la Charte, une égide de la constitution de l'an VIII. Qu'un magistrat subalterne et amovible, dont la langue est enchaînée et les discours dictés par la crainte de déplaire à l'autorité, se croie obligé de conclure à l'autorisation préalable du Conseil d'état avant de poursuivre et de faire punir un fonctionnaire coupable d'excès envers un citoyen, on le conçoit ; mais le juge intègre et courageux ne doit voir que la loi, n'écouter que la justice. L'arrêt qui repousserait l'exception de l'agent coupable *et les conclusions du ministère public*, loin d'avoir la censure à redouter, serait infailliblement maintenu par la Cour de cassation, attendu qu'au lieu de violer aucune loi existante, il serait conforme aux principes de la charte, *qui veut que tous les Français soient égaux devant la loi, quels que soient d'ailleurs leurs titres et leurs rangs*. Pour démontrer de plus en plus combien est contraire aux principes constitutionnels et aux dispositions de la Charte, la

(1) Toullier, t. 1, No. 216, p. 191.

nécessité de l'autorisation du Conseil d'état, pour faire poursuivre un agent du gouvernement prévenu d'avoir attenté à la sûreté et à la liberté d'un citoyen, il suffit d'en examiner les suites et les conséquences. Le droit d'accorder l'autorisation de poursuivre supposerait que le Conseil d'état a le droit de refuser, et par conséquent de suspendre, d'anéantir l'action de la loi, *et même de se rendre juge en premier et dernier ressort entre le plaignant et le prévenu.* Or, en donnant au Roi le droit de faire grâce, la Charte ne lui a point donné le droit de soustraire le criminel au jugement qu'il doit subir, ni d'évoquer l'affaire à son conseil, *encore moins d'enlever aux juges compétens la connaissance d'un délit, et d'empêcher la personne lésée d'en poursuivre devant eux la réparation.* C'est pourtant ce qui arriverait si le gouvernement pouvait empêcher, par un refus d'autorisation, de poursuivre ses agents coupables d'attentats à la sûreté ou à la liberté individuelle." (1) The case as it presented itself in France, shews how utterly untenable is the position taken here by Respondent and the provincial Secretary. In France, there was a law, it was the constitution of the *an VIII*: that law, that constitution had never been repealed. In England, as well as here, there has never been any law, nor any constitutional provision, either forbidding the institution of an action, in a case like the present, without the previous authorisation of the government or prohibiting the production of papers or documents to prove it. We find no other authority than a few decisions which are not only erroneous, but in no manner analogous to the present case. In France, the *Charte* of 1814, has had the constitutional effect of effacing, obliterating, nullifying the tyrannical 75th article of the Constitution of the *an VIII*, and it will be seriously contended, that the glorious British Constitution will have less power to secure the rights of the subject, than the *Charte* of 1814, under the French government! Impossible! Impossible! With *Magna Charta* before my eyes, with the working of the incomparable constitution of Britain and our own, with the Imperial Act of 1774, (Quebec Act) as the bulwarks of our civil and political rights to fortify my position, I never can be brought to believe, and much less to concede and proclaim, in a Court of Justice, that as British subjects, we are less free, less secure in the exercise of our rights, than French subjects under the *Charte* of 1814, at the time of the restoration. I never can, and I trust never shall acknowledge as a true one, the paradoxical proposition, that, under the protection of the freest and best constitution in the world, and the most solemn imperial statute guaran-

(1) Toullier, t. 1, No. 225, pp. 201, 202 et 203.

teeing our rights, an action may be *instituted* against any one who has caused damage to his fellow subject, but that it will be in the power of a secretary or of any member of the government, to deprive the injured of the evidence which he may adduce, to entitle him legally to a verdict or a judgment. I am, therefore, of opinion, that this Court should reverse the decision of the Court below, upon the principle that there exists in law, no such privilege as that claimed by the Hon. Provincial Secretary. Apart from such a dangerous, monstrous pretension being set forth, as one based upon the law, necessity and arguments *ab inconvenienti*, are, as usual in such cases, resorted to. Well let us try that illogical, unsafe test: illogical and unsafe here, as it is in most cases. Are you to compare the discretion, the unbiassed mind, the position of the judge who is alike independent of the Crown and of the people, who is free from party spirit, who knows or should know no one, to the biassed mind naturally, necessarily, biassed mind of a politician, not independent as the judge is, but dependent upon a party, who knows or must know the contending parties, and may have the most cogent reasons for supporting one party, in preference to another; who has to bear, and does bear the external pressure which the judge is or should be inaccessible to; whose interest it may be, under the flimsy pretence, under the transparent veil of pretended public interest, to screen some petty minion in office? The comparison cannot hold for a moment. In the case of the judge, you have sacred guarantees; in that of a politician, you have none. External pressure will curb down the politician, whilst you will behold the judge more erect than ever, calmly and firmly resisting and baffling its baneful influence. Clearly then, manifestly, should it be left to the judge on the Bench, in his discretion, to determine the question, instead of allowing a secretary, or any member of the government, to silence him, to interfere with the administration of justice, and to become the judge, and, as Toullier says, *de suspendre, d'anéantir l'action de la loi, et même de se rendre juge en premier et en dernier ressort entre le plaignant et le prévenu*; and this, upon his mere refusal backed by an assertion which may either be false, or an erroneous construction of a writing, a communication which is purely and simply a libel by a *protégé*, against a political opponent, or any other member of the community. Now, I come to an other point. Assuming as I do, that it is not in the power of any member of the government to substitute himself in the place of the judge on the Bench, to silence him, and thus, to prostrate law and justice, by means of his arbitrary and irresponsible *non volo*, I ask, how in the name of reason, can such a letter as

that complained of by Appellant, made public by the very Department of the Executive Government, which the Hon. Secretary is the head of, sent to Appellant by that Department, and of record in this case, how can such a letter, I ask be considered of such a nature, that if the witness proves it to be a copy of the original which he refuses to exhibit to the court, the result will be injurious to the public service? This very case, this very flimsy, unfounded pretence, this unjustifiable refusal of the Hon. Secretary to prove the letter, which, through the instrumentality of the Assistant Provincial Secretary, one of the acknowledged channels of communication with the Department of the secretary, and actually, in most cases of importance, the *medium* of such communication, has been made public, shews up, in its true light, the danger, were it even legal or constitutional (which it is not) of the exhorbitant pretension now set up. The Hon. Judge who presided at the trial, had it in his power, and at a mere glance at it, with his well known clear mind and sound judgment, had he thought proper to do so, might have seen through the transparency of the objection raised by the Hon. secretary and Respondent. Such a letter, if proved, injurious to the public service! In what respect? How could the fact that Respondent had libelled Appellant, supposing he has, be injurious to the public service? Is Respondent such an important fonctionary, that if, when brought before a jury of his country, to be dealt with, as every other man, whoever he may be, should in all respects be, a letter alleged to have been written by him to the government, libelling Appellant, and made public by the government, must not be proved before the Court and Jury, because, and for no other reason, the provincial secretary contents himself with telling the court that it would be injurious to the public service? Is the government to fall to pieces, and the country to be convulsed, because what is known already, to a large portion of the community, is to be repeated before the Court and Jury? and how are we to know that? The secretary won't allow the judge to exercise his legitimate fonctions, he sets himself up as the judge, and by his *veto*, he decides without appeal, as he conceives, that Appellant is to have no justice, because Respondent being a functionary liable to be removed *at pleasure*, and the witness being a member of the administration, it would be injurious to the public service to do, in this case, what the law of the country prescribes should be done in all cases. I must be permitted to say, that in a logical, legal or constitutional point of view, it is difficult to imagine a more flimsy pretension. The Judge on the Bench should, in my opinion, at once have told Mr. Secretary Alleyn, that he was bound to exhibit the

original he was commanded to bring up with him, and to answer whether the copy filed in this cause, was or was not a copy of that original, coming from, and sent to Appellant, by the government to whom it is alleged by Appellant the original had been sent by Respondent. The judge having the copy before him, was in a position at once to see and understand, that therein, there was not a word to be found prejudicial to the public service; he therefore, might and ought to have, on the spot, ordered the production of that original. I understand that if there be any law, justice and reason for the *absolute* admission of the principle of privilege as contended, but which I deny, it might *arbitrarily* be enforced, when the judge or the Court, have before them, neither original, nor copy; but in the name of reason, how could that be, when the judge or the Court have before them, in the record, a paper which contains nothing against the public service, or prejudicial to public interest, and the communicating whereof, cannot, therefore, be said to be injurious to the public service? It is manifestly laying down the rule, that a secretary, or other public functionary, member of the government, will be at liberty to say, that white is black, and that he must be believed, and that although in any particular case, white will always be white, and not black, the secretary having, on his oath, said that white is black, and added that if he were to acknowledge that white is not black, it would be injurious to the public service, the judge or the Court must either respond by saying, with the secretary, that white is black, or decline deciding that white is not black, or shutting their eyes to the radiant and beneficent light of the sun tacitly own, that they cannot distinguish between one and the other, and that they are incompetent for that operation: a very enviable position for a Court of Justice, surely. The following authority appears to me more reasonable than any of the exaggerated notions set forward as principles for the guidance of the Court. Again and again, I repeat, I deny the principle, but were it a true one, the following would be a sound exception: "But communications though made to official persons, are not privileged, when they are not made in discharge of any public duty, such for example, as a letter by a private individual to the chief secretary of the Post Master General complaining of the conduct of the guard of the mail towards a passenger." (1) What are the facts here? M. Gugy complains of M. Maguire. The government, of course, communicates the complaint to M. Maguire. M. Maguire answers it, and, in a long letter, writes, as is pretended by M. Gugy, a

(1) Greenleaf, Law of Evidence, Vol. 1, p. 318.

libel against him. M. Maguire's answer is forwarded to M. Gugy by the government, through the Assistant Provincial Secretary. M. Maguire's defence, which the government have themselves made public, establishes the important fact, that it was not M. Maguire who, in the exercise of his official duties, as superintendent of Police, communicated information to the government, which the public service requires to be kept secret, as is pretended, but it was M. Gugy who had complained. Is it, then, to be pretended for a moment, that this answer of M. Maguire, which he makes in his private capacity, as an accused, is to be privileged because he thinks proper, as is alleged, to step out of the legitimate line of self defence, and mix up with his answer, a libel against M. Gugy ? Let us now turn the scales. Let M. Gugy be the libeller, in an answer to a complaint made against him by M. Maguire. The government, of course, incloses M. Gugy's answers to M. Maguire who, at once, discovers that M. Gugy, instead of confining himself to answering M. Maguire's complaint, indulges in a series of calumnies. M. Maguire's, as of right, takes out an action against M. Gugy, and brings him up before a jury. I would like to know whether M. Gugy would be sustained, were he even backed by a Provincial Secretary, or any member of the government, if he had the courage to assert, and if both asserted, that such a communication is privileged ? For my part, I would tell M. Gugy that it is not; I would order the Provincial Secretary to produce the original, and, on his refusal, I would deal with him as I would with any other person. One word more, and I have done. It must strike any one who has given, or would give this case, some attention, that the question such as it comes up here, is altogether different from those which it is pretended have been decided in England. The authorities and decisions cited, cannot, therefore, in any eventuality, be invoked as rules for the present case. As to inferences which may be drawn from decisions in the United States, on such a question, I have simply to remark, that the peculiar and not to be imitated position in which the judiciary, generally, stands in that country, and the pressure which, externally, may so easily be, and often times is, brought to bear upon the judges by intriguing influential politicians, to serve their own purposes or those of their friends, should deter us from ever citing such precedents, if any are to be found applicable to the present case. Upon the whole, it therefore appears to me, that, in whatever light this important question is viewed, the decision of the Court below should be reversed, and a new trial granted to Appellant.

AYLWIN, Justice: "That a government official cannot be

compelled in the course of judicial proceedings to produce documents, or disclose facts, affecting the public interests, and that the official or his superior must be the judge of the propriety of withholding the information, may be considered established law in this country. *Marbury* vs. *Madison*, 1 Cranch 144; Burn's trial, 186, 7; *Gray* vs. *Pentland*, 2 Sergeant and Rawle, 23, as explained in *Yoter* vs. *Sanno*, 6 Watts, 156; Cooper's Case, Wharton's State Trials, 662, 667." This is the note by Mr. Wharton, in the report of the case of *Beatson* vs. *Skeene*, in the 5 Hurlstone and Norman, 854, Baron Pollock says, in the case: "My brother Martin does not entirely agree with us as to the view of the point in question. My brother Martin is of opinion, that, whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, *notwithstanding the reluctance of the Head of the Department* to produce it. And perhaps cases might arise where the matter would be so clear that the judge might well ask for it, in spite of some *official scruples* as to producing it; but this must be considered rather as an extreme case, and extreme cases throw very little light on the practical rules of life." I regret the opinion expressed by Baron Martin, mere scruples have nothing to say on the part of the witness, and still less on the part of the judge, who has no right to express any opinion, if the government official swears that the disclosure of the facts affects the public interest. The disclosure is to divulge *inter arcana imperii*, which no judge can dare to undertake, and it is not likely that a Secretary of state will ever be compelled by an English judge to give evidence which discloses facts affecting the public interest. The public interest is to be decided by the government official, not by the judge, who has nothing to do with it, and ought to have nothing to do with it, unless indeed the Bench are to determine between a Plaintiff or a Defendant, perhaps an enemy of the state, and the public servant of the Crown, which of the two is to be believed. The evidence of Mr. Parent, or his letter, is not the evidence which is to direct whether the public interest is to grant the document or withhold it. It is the superior of Mr. Parent, who alone can be the judge of the question, that judge is the Provincial Secretary, acting upon his oath. But it is to be observed that every public document which is transmitted to the secretary's office, is under the control of the Governor General. The Provincial Secretary is bound to take care of the public documents committed to his actual custody, and no paper can regularly be taken from his office for a moment without the permission and order of the Governor General.

In withholding a document, it is supposed that it is done by the order of the Governor General, without whom no communication nor any change of deposit of the paper can be allowed or is possible. A secretary cannot be allowed to divulge the secrets of his government, nor can it be permitted by any other party, or by means of an assistant or other writer. Again, it is to be observed that the objection to produce the evidence made by Mr. Alleyn is not only of the supposed libel, but it comprises "all the documents connected with the complaint of the Plaintiff." Other documents then are connected with the libel, which we know nothing of, nor of the writers, but it is sworn that if published, they would be injurious to the public service. It is enough that this is sworn by the Provincial Secretary, to prevent any disclosure upon the subject matter of the documents, as well as that which Appellant has endevoured to procure, that which forms the subject of his demand. Let us suppose that the Assistant Secretary may have been in error in signing the certificate and the copy of the supposed libel, what, is it to be ordered that more mischief is to be done by the disclosure of other facts, and other documents in respect of other parties, injurious to the public service? With the fact sworn to by Mr. Alleyn, and with nothing on the contrary to show that the evidence attempted to be adduced would not be injurious to the public service, the enquiry ceased, the Court was compelled to stop the trial at the point at which it did, and I am therefore of opinion that the judge did right, and that the judgment of the Court below must be affirmed.

MEREDITH, Justice: The judges of this court are all, I believe, agreed in the opinion that the head of a department of of stated cannot be compelled, at the instance of a private suitor, to produce an official document in his custody, when the production of the document would, on grounds of public policy, be inexpedient The question then arises: with whom does it rest to determine whether the production of a particular document is, on such general grounds, inexpedient? The majority of the court hold that the head of the department having official custody of the paper is necessarily the proper person to determine the question, while one of the members of the court (Mr. Justice MONDELET) maintains that it must be determined by the judge. The general principles of law as well as the decisions of the courts, both in England and the United States, appear to me to be entirely in favour of the opinion of the majority of the court. I shall briefly review the leading cases bearing on the question which have been decided in England and in the neigbouring states. The earliest of the english cases referred to as relating to this subject is

the case of *Wyatt* vs. *Gore*, (1) tried in 1816, in which Chief Justice GIBBS ruled that communications which take place between the governor of a colony and his attorney general, are privileged communications, and that a witness in a court of justice interrogated as to their substance *is not bound to answer to any question respecting them.* About the same time, 1816, the case of *Anderson* vs. *Sir W. G. Hamilton*, was tried before Chief Justice ELLENBOROUGH. In that case, Lord Liverpool, who had been secretary of state for the colonial department, was examined as a witness on the part of Plaintiff, and, in the course of the trial, Lord Ellenborough observed in effect that: " If an objeceion had been made by the Noble " Earl to the production of this correspondence, as a matter " of state, *I should have given the fullest effect to that objec-* " *tion.*" (2) Four years afterwards, Chief Justice ABBOTT, in the well known case of *Home* vs. *Bentinck*, maintaining an objection made by Defendant, refused to allow the minutes of a Court of inquiry, in the possession of Sir Henry Torrens, military secretary, to be read as evidence. (3) This case was afterwards taken to the Court of Exchequer Chamber, where the ruling of Chief-Justice Abbott was unanimously confirmed. In the case last mentioned, the commander in chief, as Head of the Department, having the custody of the papers, did not appear; and, therefore, the question did not arise as to whether it was for him, or the presiding judge, to determine the question as to the expediency of producing the papers; but, still, the judgment of the two Courts in *Home* vs. *Bentinck*, irrespective of the light they throw upon the present cause in other respects, are of importance as showing that the discovery of truth, in inquiries necessary for the administration of justice is, as has been justly remarked by an esteemed author, an object which, however " desirable in itself, may nevertheless be " counterbalanced by mischiefs arising from disclosures which " would be prejudicial the public interest." (4) But the most important English case, as to the point now under consideration, in the case of *Beatson* vs. *Skeene*, which was decided in the Court of Exchequer as lately as the year 1860, and in which, according to the marginal abstract, it was held: (Baron Martin dissenting) " That a judge at *nisi prius* has no " power to compel a witness to produce documents connected " with affairs of state, if their production would be injurious

(1) Holt's *Répertoire*, p. 299, *Wyatt* vs. *Gore*.

(2) 2 Brod. and Bing., p. 143; 6 E. C. L. Rep., p. 50, *Anderson* vs. *Hamilton*.

(3) 2 Brod. and Bing., p. 130, *Home* vs. *Lord F. C. Bentinck*.

(4) Philips on Ev., 8th Ed., Vol. 1, p. 189.

" to the public service, and that question must be determined " not by the judge but by the head of the department having " the custody of the documents." In *Beatson* vs. *Skeene*, which was an action for slander, the secretary of state for war, (M. Sydney Herbert,) had been summoned to produce certain letters, written by the Plaintiff to him, and also the minutes of a certain Court of inquiry. The secretary for war attended at the trial, but objected to produce the documents on the ground that his doing so " would be injurious to the public service. " The presiding judge (Baron Bramwell) refused to compel their production. This ruling was made one of the grounds of a motion for a new trial, and chief Baron Pollock in the course of his observation rejecting that application said: (1) We are of opinion that, if the production of a state paper would be " injurious to the public service, the general public interest " must be considered paramount to the individual interest of " a suitor in a Court of Justice; and the question then arises " how is this to be determined ? It is manifest it must be de- " termined either by the presiding judge, or by the respon- " sible servant of the Crown, in whose custody the paper is. " The judge would be unable to determine it without ascer- " taining what the document was, and why the publication " of it should be injurious to the public service, an inquiry " which cannot take place in private, and which taking place " in public may do all the mischief which it is proposed to " guard against. It appears to us, therefore, that the question " whether the production of the documents would be injurious " to the public service, must be determined, not by the judge, " but by the head of the department having the custody of " the paper; and if he is in attendance and states that in his " opinion the production of the document would be injurious " to the public service, we think the judge ought not to com- " pel the production of it. The administration of justice is only " a part of the general conduct of the affairs of any state or " nation, and, we think, is (with respect to the production " or non-production of a state paper in a Court of Justice) " subordinate to the general welfare of the community. " Having thus succinctly adverted to the leading English cases on this subject, I may observe that the decisions of the courts in the United States, as to the point under consideration, agree with the english cases already referred to. As early as the year 1815, the law on this subject was fully discussed in the Supreme Court of Pennsylvania in the case of *Gray* vs. *Pentland*; and, as the observations of the judges, in that case, seem to me to explain satisfactorily the reasons for the rule

(1) 5 Hurlstone and Norman's Reports, p. 851, *Beatson* vs. *Skeene*.

under consideration, in so far as it is applicable to the present case, I shall refer briefly to the facts of that case, and to some of the observations made by the bench in disposing of it. In that case, *Gray* vs. *Pentland*, which, also, was a suit for libel, Plaintiff, who was prothonotary of a county court, alleged that Defendant had made a deposition before a justice of the peace, charging Plaintiff with several offences in the transaction of his official business, and concluding with an allegation: " that, from frequent intoxication, he was unfit to perform " the duties of his office with dignity and propriety;" Plaintiff further alleged that the deposition so made had been sent by Defendant to the governor of the commonwealth. The governor and secretary were served with subpœnas; and a rule was entered for the purpose of taking their depositions. They however declined to appear, and also refused to deliver to Plaintiff the deposition made by Defendant; and with reference to that part of the case, Chief Justice TILGHMAN observed: " It is a matter of very delicate concern to compel the chief " magistrate of the state to produce a paper which may have " been addressed to him in confidence, that it should be kept " secret. Many will be deterred from giving to the governor " that information which is necessary, if they are to do it at " the hazard of an action, and of all the consequences flowing " from the enmity of the accused. It would seem reasonable, " therefore, that the governor, who best knows the circum- " stances under which the charge has been exhibited to him, " and can best judge of the motives of the accuser, *should* " *exercise his own judgment* with respect to the propriety of " producing the writing." Mr. Justice YEATES, in the same case observed: " I admit that this case, under all the circum- " stances, bears hard upon the Defendant in error (the Plain- " tiff in the court below) but a hardship of a like nature exists, " where a Defendant, acquitted on a charge of felony, has " been denied the copy of the record of his indictment and " acquittal. without which he could not support an action of " malicious prosecution. (1) Be the hardships of this case what " they may, I deem it more eligible that a private incon- " venience should be submitted to rather than introduce a " public mischief." The case of *Gray* vs. *Pentland*, about twenty years afterwards, was cited, and in so far as it bears upon the question before us, was approved of by the Supreme Court of Pennsylvania in the case of Yoter and Sanno. (2) The law on this subject as stated in the ninth, and as I believe, last edition of professor Greenleaf's excellent work on evidence

(1) 3 Bl. Com. 126.

(2) 6 Watts, *Répertoire*, p. 156.

is as follows." The president of the United States and the gover-
" nors of the several states, are not bound to produce papers
" or disclose information communicated to them, *when in their*
" *own judgment*, the disclosure would, on public considerations,
" be inexpedient." (1) And, in the american edition of Hurlstone and Norman's reports, containing the report of *Beatson* vs. *Skeene*. I find a note in the following words: "That a govern-
" ment official cannot be compelled in the course of a judicial
" inquiry to produce documents or disclose facts affecting the
" public interest, *and that the official, or his superior, must be*
" *the judge of the propriety of withholding the information,*
" *may be considered the established law of this country.*" (2) It may at first sight appear strange, that any question, arising in the course of a trial, should be determined, not by the presiding judge, but by a witness; it is however to be recollected that in the case before us, the witness is not a private individual, but on the contrary a high officer of state, directly responsible to the representatives of the people of this province, for the proper discharge of his duties; and that the question to be decided is as to whether that officer should or should not produce a paper, which he holds in his official capacity for the benefit of the public; and when we bear in mind the official character of the witness, and the nature of the question, it seems to me not unreasonable that it should be decided, not by the judge, but by the public officer entrusted by law with the custody of the paper. It may be observed that the head of a Department required to produce a paper, might not have any objection to produce that paper if it stood by itself; but he might, at the same time, be aware that if he produced the paper demanded, he ought, in justice to the parties concerned, to produce other papers connected with it, the publication of the contents of which might be injurious to the public service. This consideration shows that the head of a Department may have valid reasons, not apparent to others, for declining to produce papers in his possession; and furnishes, I think, an additional ground to prevent the judiciary from arrogating to itself the power of dictating, as to the production of papers of which the members of the Executive Council are depositaries, in trust for the public. Moreover, were we to say that a judge of the Superior Court has authority to dictate to Her Majesty's confidential advisers as to the productions or non-production of papers in their charge, we

(1) Greenleaf, *On evidence*, p. 349, n° 251, and the numerous cases there cited: See also 3 Wheeler's *Répertoire*, p. 109.

(2) Amer, ed. of Hurlstone and Norman's *Répertoire*, vol. 5, p. 855. See also notes by judge Cowen and Mr. Hill on Phillips *On evidence*, vol. 3rd, p. 195, note 154.

could not, (it seems to me) avoid saying that a police magistrate, a Recorder, or Chairman of Quarter Sessions, has the same power; nay we would probably have to go farther; and to say that the lowest member of the judiciary, can adjudicate as to the production or the non-production of the most important state papers in the possession of the highest officer of the provincial government; and if this can be done with respect to officers of the provincial government, I can see no reason for saying that it could not be done with respect to officers of the imperial government. Other considerations of this kind might be urged in support of the same view; but, I deem it needless to do so, because it appears to me to be settled by authorities, *binding upon* us, that the question as to whether the production of a document would be injurious to the public service, ought to be determined not by the presiding judge but by the Head of the Department having charge of the document. Before leaving this branch of the case it may be well to refer to the 14th Geo. III, cap. 83, which has been spoken of by my learned brother Mondelet as having an important bearing upon this case. It is true that, under that statute, we are bound to decide all controversies "relative to property and civil rights," agreeably to the law and customs of Canada. But assuredly it does not require any argument to show that the question, as to whether the head of a Department of state, ought, or ought not, to dispossess himself of a paper, which he holds in his official capacity, must be determined, not by the custom of Paris, or the ordinances of the French Kings, but by the public law of England; and indeed it is equally plain, that, as to the matter under consideration, the Appellant could derive but little advantage from his case being decided by the laws of France, whether ancient or modern. Some stress has also been laid upon the fact that this colony has the advantage of a system of government usually spoken of as responsible government. Yet this consideration, (if it has any bearing on the question before us,) appears to me not to militate against, but rather to support, the judgment about to be rendered. If it be objectionable that the power in question should be exercised by the provincial Secretary, even although he is now directly responsible to the representatives of the people, it can hardly be contended that the exercise of that power would be less objectionable, if the provincial secretary were not so responsible. I now proceed to consider the argument advanced in favour of Appellant's demand, on the ground of a previous delivery to him of a copy of the document in question by the assistant secretary. It is maintained by Appellant that the fact of the assistant-secretary having officially trans-

mitted to him a copy of the document, deprives the secretary of the right, if he ever possessed it, to refuse the production of the original. After giving to this part of the case much consideration, it seems to me, upon principle, even independently of authority, that the proposition just mentioned cannot be maintained. The delivery of a copy of a document and the production of the original of it, are, in law, distinct and different acts; the legal effects incident to the production of the original, being very much greater than those which could result from the delivery of a copy. If this be true, (and that it is so is made plain by the case before us, in which a copy is useless for the purpose for which the original is required,) then, how can the doing of the less important of the two acts, by the assistant secretary, deprive the Head of the Department of the discretionary power, which, in our opinion, is vested in him by law, as to the performance of the more important of the two acts. And here it may be noticed that, although M. Parent's letter of the 23rd of November, 1860, acknowledging the receipt of the complaint of Appellant, purports to have been written "by command of the administrator of the government." Yet, that M. Parent's letter of the 5th December 1860, enclosing a copy of the answer of Respondent, does not purport to have been written by the command of the administrator of the government, or of the Head of the Department in which M. Parent is a subordinate officer. Bearing this in mind, it seems to me that the proposition under consideration amounts to this: that the performance of one act, by a subordinate officer in a department, merely of his own authority, can, in law, have the effect of depriving the head of that department of a discretionary power, vested in him by law, as to the performance of another, not only different, but more important act. If it were true, as seems by some to be taken for granted, that the importance to the State of keeping secret the contents of a document, is the only ground that could justify the head of a department in refusing to produce a paper in Court; then the facts that the Appellant had already been furnished with a copy of the paper in question would no doubt materially affect the case. But, even viewing the case in this light, it is to be recollected that, as already observed, the production of one paper, to the publication of the contents of which there may be no objection, might, as a matter of justice, render it necessary to produce other papers, which a due regard to the public service might require to be kept secret. It is also to be observed that, in *Home* vs. *Bentinck*, an office copy of the papers which Chief-Justice Abbott refused to allow to be produced, had been delivered to the Plaintiff "*from the office of the Commander in Chief.*" It

is therefore plain that, in that case, no state secret would have been divulged by the production of the original papers which were witheld; and yet, it does not seem to have been thought by any of the Judges who decided that case, nor to have been contended by any of the Counsel who were engaged in it, nor even to have ben supposed in any of the cases in which reference is made to it, that the delivery of a copy "*from the office of the commander in Chief*" had any tendency to give the plaintiff a right to compel the production of the original. In the case of *Gray* vs. *Pentland*, also, none of the Judges based their judgment on any interest the state had in keeping secret, in the ordinary sense of the words, the contents of the paper, the production of which they refused to enforce. The provincial secretary did not, in the present case, state the grounds upon which he thought it will be *injurious* to the public service to produce the original of Respondent's letter. The consideration of secrecy, in the usual sense of the term, was out of the question, for the contents of the paper had been made public by the delivery of a copy of it; but it is possible that the provincial secretary may have been guided to the conclusion at which he arrived, by the same reasons which were urged by the court in support of the judgment in *Gray* vs. *Pentland*. In that case, Judge Breckenridge said: "It would restrain the "free communications that might be necessary for the public "good in case of a candidate for office, or of one who was "alleged unworthy to retain an office, to lay it down that a "governor, or the competent authority for appointing and "removing, should be compellable to produce papers for the "purpose of supporting an action in a Court of law;" and it will be recollected that Chief-Justice Tilghman in the same case said: "Many will be deterred from giving to the gover-"nor that information which is necessary, if they are to do "so at the hazard of an action, and of the consequences flow-"ing from the enmity of the accused." Now, if the doctrine which has been thus clearly laid down in the American Courts, and which, if not so clearly enunciated in the English Courts, appears to have been acted upon by the Chief-Justice of the King's Bench, and the Court of Exchequer Chamber in *Home* vs. *Bentinck*, be well founded; then it is plain that the delivery of a copy of the paper in question, even if it had been made by the secretary himself, as it would not be evidence in an action against the writer, could in no possible way impair the force of one of the grounds upon which a public officer might, in the exercise of his discretion, consider it proper to withhold an original document in his possession. The pretension on the part of Appellant appears to me, to be, in

effect, that even if the secretary had the power, of determining upon the production of the original paper in question; that he has waived the exercise of that power, by the delivery of a copy of the paper to Appellant. In addition to what I have already said as to this pretensions, I may observe that as I view the matter the doctrine of waiver can have no application in the present case. When authority is given to a public officer for the public good; the exercise of the authority so given is a duty, not a privilege. And if, as I think, the secretary had power to determine whether the original paper in question, could or could not be produced consistently with a due regard to the public service, he then had no greater right to waive the exercise of that authority, then a judge would have the rendering of a judgment in a case regularly brought before him. At the second argument in this case, it was strenuously contended by the learned counsel for the Appellant, that the case of *Home* vs. *Bentinck*, cannot have any bearing upon the case before us; because in that case, the Defendant acted in the discharge of a public duty, with respect to the matter complained of, whereas, in the present one, Defendant, in writing the alleged libel, did not act in discharge of a public duty; but on the contrary (it is said) was a mere wrong doer. This argument ought doubtless to have great weight in the proper quarter; but Appellant cannot, I apprehend, derive any advantage from it in this Court. Holding, as we do, that the question as to whether a paper in the possession of the provincial secretary, ought or ought not to be produced in the course of a judicial proceeding, is to be determined by that officer and not by the presiding Judge; it follows, that all collateral matters connected with questions, as to the nature of the paper required to be produced, the motives of the writer, and the protection to which he may be entitled, are also for the consideration, at least in the first instance, of the Head of the Department having the custody of that paper. If Appellant thinks himself aggrieved by the decision of that officer, he may probably appeal to the Governor in Council, with a right of a further appeal to parliament; but if, as we hold, the question, as to the production or non-production of the paper is to be determined by the secretary, then we cannot be called upon to pronounce any opinion upon the sufficiency or insufficiency of the reasons urged for the non-production of the paper. It is for this reason that I have deemed it my duty to abstain from the expression of any opinion as to whether, under the circumstances of this case, Appellant has or has not reason to complain of the non-production of the letter in question. It was also contended, in the course of the second argument before us, that the case of *Beatson* vs.

Skeene differs widely from the present case; because, in *Beatson* vs. *Skeene*, the Head of the Department protected a person who had given information against a public officer, whereas here it is the public officer who is protected to the prejudice of the person complaining against him. It may perhaps be answered that a public officer defending himself against a charge, ought to be allowed the same latitude of observation, and to be afforded the same protection, as his accuser; but this question, also, in so far as it relates to the production or non-production of a paper in the custody of any of the public departments, is according to our views as already explained, for the consideration not of the Court, but of the Head of such Department. I must now close these observations, and I shall do so by observing that the case of *Beatson* vs. *Skeene*, which, in this respect, agrees with the other cases already cited, expressly decides that the question as to the production or non-production of a paper in the custody of the Head of a Department is to be determined by that officer, and not by the judge, before whom he may be required to appear; and I may add that no authority has been cited tending to show that the delivery of a copy of such paper, from the department in which it is deposited, can deprive the head of the Department of his discretionary power as to the production of the original; and, on the contrary, that the case of *Home* vs. *Bentinck* is an express authority, in support of the opposite doctrine. I cannot fail to bear in mind that the judgment of Chief-Justice Dallas, in the Court of Exchequer Chamber, confirming the opinion of Chief-Justice Abbott, in *Home* vs. *Bentinck*, has just been spoken of, by my brother Mondelet, as "altogether untenable," and as being the expression of a "very erroneous and most illogical opinion," and that my learned brother has said that he is surprised that that case should have been cited here. I, therefore, feel called upon to observe, although under other circumstances I hardly would have deemed it necessary to do so, that the case of *Home* vs. *Bentinck* is cited the same way, and without, so far as I know, any expression of disapprobation, by the most eminent writers (1) on the Law of Evidence, and of Courts Martial; (2) and that tending to establish, as it does, a very

(1) Starkie, Ed. of 1834, Vol. 1, p. 58, note; Same Vol., p. 137, note; Phillips on Ev., Ed. of 1838, Vol. 1, p. 193; Greenleaf on Ev., Ed. of 1858, Vol. 1, No. 251; 1st Taylor on Ev., Ed. of 1858, p. 781; Notes on Phillips, by Judge Cowen and Mr. Hill, 1 Vol. of Notes, p. 195 note, 154; Greenleaf, Vol. 3, No. 498.

(2) Simmonds on Courts Martial, Vol. 1, p. 80; Prendergast, Laws relating to army, p. 192; Manual of Military Law, (1861) by Col. Pipon and M. Colliers, pp. 158, 159.

important point of constitutional law, it appears to have been tacitly acquiesced in by the people, the Court, and the parliament of the United Kingdom for nearly half a century. And such being the case it seems to me, notwithstanding the observations of my learned brother Mondelet, that the case of Home and Bentinck may well be cited as an authority in any British Colony. It is not without reluctance that I have occupied so much time in the explanation of my views in this cause: but, as the questions which it presents are now for the first time, I believe, raised in our Courts, and as they are of general interest and importance, and by no means free from difficulty, I have felt it incumbent upon me to explain fully the grounds upon which I am of opinion that the ruling of M. Justice Taschereau, at the trial in this cause, confirmed as it is by the judgment of M. Justice Stuart, ought not to be disturbed by the Court. (13 *D. T. B. C.*, p. 33.)

FOURNIER and GLEASON, for Appellant.

CAMPBELL and KERR, for Respondent.

JURIDICTION DE LA COUR DES COMMISSAIRES.

COUR SUPÉRIEURE, Arthabaska, 19 mars 1862.

Présent STUART, juge.

Ex parte, BOURBEAU DIT VERVILLE, Req. pour certiorari.

Jugé: Que la Cour des Commissaires a juridiction dans une action pour recouvrement de la balance d'une somme excédant $25, pourvu que telle balance n'excède point cette somme. (1)

Richard, de Stanfold avait poursuivi le requérant devant la Cour des Commissaires de cette localité, pour le recouvrement d'une somme de $20, balance d'une somme excédant $25, et obtint en sa faveur un jugement condamnant le requérant à lui payer cette balance. Le Défendeur présenta à la Cour Supérieure d'Arthabaska une application pour obtenir un bref de certiorari afin de faire annuler ce jugement, prétendant que, comme la dette était la balance d'une somme excédant $25, la Cour des Commissaires n'avait pas juridiction. Cette application fut résistée de la part de Richard, et la cour renvoya l'application pour certiorari, attendu que la *somme demandée* n'excédait point $25. (2) (13 *D. T. B. C.*, p. 65.)

PACAUD, pour le requérant.

DUVAL, pour Richard.

(1) V. art. 1198 C. P. C.

(2) Statuts refondus du Bas-Canada, ch. 94, sec. 7.

COMPROMIS.—DISTRACTION DE FRAIS.

BANC DE LA REINE, EN APPEL, Montréal, 17 septembre 1861.

Présents Sir L. H. LAFONTAINE, Bart., juge en chef, AYLWIN, DUVAL, MEREDITH et MONDELET, juges

HEBERT DIT LECOMPTE, Appelant, et LA FABRIQUE DE ST JEAN, Intimée.

Jugé: 1° Que dans le cas d'un compromis entre le Demandeur et le Défendeur, le Défendeur se chargeant de payer les frais de l'action avant l'entrée, le Demandeur ne peut faire rapport de son action pour les dépens.

2° Que la demande pour distraction de dépens par les conclusions de la déclaration n'a pas l'effet de priver le Demandeur de son droit de compromettre.

3° Que nulle distraction de dépens n'existe, ou ne peut avoir lieu, sans être ordonnée par un jugement de la cour. (1)

Cette action fut instituée en Cour Supérieure par Lecompte, l'Appelant, contre le curé et marguilliers de la fabrique Saint-Jean, demandant possession d'un banc en leur église, l'action fut portée par le ministère de Casault et Langlois, procureurs, qui demandèrent distraction de frais en leur faveur. Cette action était rapportable le 3 mai, 1860. Le 29 avril, avant l'entrée de l'action, Lecompte prit arrangements avec les Défendeurs, et mit au néant sa demande en acceptant de la part des Défendeurs un titre à la possession du banc en question, à la condition que les Défendeurs paieraient les frais encourus jusqu'alors, lesquels frais devaient être taxés, mais cette dernière condition ne se trouvait pas mentionnée dans l'arrangement. Le 3 mai, l'action fut entrée faute de paiement des frais, et les Défendeurs plaidèrent l'arrangement, et offrirent de payer les frais encourus avant l'entrée de l'action. Le Demandeur, ayant établi le droit qu'il avait au banc en question, prétendit que, vu que la condition que les Défendeurs paieraient les frais de l'action avant l'entrée ne se trouvait pas à l'arrangement notarié, et, vu que, le jour du retour, ces frais n'étaient pas payés, il devait avoir jugement pour les frais. Le 4 février, M. le Juge TASCHEREAU rendit le jugement suivant: " Considérant que le Demandeur, le 29 d'avril dernier, savoir: trois jours avant le jour fixé pour le rapport devant cette Cour du bref de sommation et de la déclaration en cette cause, a pris arrangements avec les Défendeurs et a mis au néant sa demande, en acceptant de la part des Défendeurs un titre à la possession du banc en question, à la condition que les Défendeurs paieraient les frais encourus jusqu'alors et à être taxés; considérant que cet arrangement a eu pour effet

V. art. 482 et 1341 C. P. C.

de mettre fin à la demande du Demandeur, et a réduit son recours à la seule demande des frais lorsqu'ils auraient été taxés ; considérant que le Demandeur ne pouvait pas, après le dit arrangement, faire rapport de son action devant cette Cour, pour recouvrer les frais à moins d'une convention spéciale, et que, d'ailleurs, les frais n'ont jamais été taxés ; considérant que la demande de distraction de dépens faite par la déclaration du Demandeur en faveur de ses avocats, Casault et Langlois, ne pouvait priver le Demandeur de prendre à l'égard de son action tout arrangement honnête, et sans but évident de priver les avocats de leurs justes honoraires, et qu'en loi il n'y a de distraction de dépens que celle qui est accordée par le jugement d'une Cour ; considérant, de plus, que le Demandeur ou ses avocats avaient en mains des deniers des Défendeurs à un montant considérable qu'il pouvait appliquer au paiement de la plus grande partie des frais encourus et, considérant qu'il n'y a eu aucune preuve de dessein chez les Défendeurs de priver les avocats du Demandeur de leurs justes salaires, et que le Demandeur en entrant son action pour toute sa demande, a forcé les Défendeurs à plaider l'arrangement ci-dessus mentionné, lequel arrangement le Demandeur a nié par sa réplique générale au plaidoyer des Défendeurs. La Cour renvoie l'action du Demandeur avec dépens, et ordonne que partie des dépens soient compensés pour tels frais auxquels le Demandeur aurait eu droit sur sa demande contre les Défendeurs, jusqu'au vingt-neuf avril dernier, inclusivement."

CASAULT, pour l'Appelant : Le jugement de la Cour Inférieure énonce plusieurs motifs qui, dans l'opinion de l'Appelant, sont erronés. Il est vrai qu'il y a eu une transaction entre les parties, mais elle contenait certaines conditions qu'il ne faut pas perdre de vue. L'Appelant a accepté l'acte de concession du banc, mais à la condition expresse que, avant le jour du rapport de l'action, les parties se rencontreraient chez ses procureurs pour y régler et arrêter le procès, le représentant des Intimés devant y recevoir le prix du banc, et payer les frais du procès. L'action ne pouvait donc être considérée comme réglée définitivement qu'après l'accomplissement de ces conditions. Lors de l'arrangement il n'a nullement été question de faire taxer les dépens. Lorsqu'un Défendeur a réglé le capital d'une poursuite, et qu'il est convenu d'en payer les dépens, l'action peut être rapportée en cour ; ce point a été décidé dans ce sens dans la cause de *Darche* vs. *Dubuc*, (1). Pour le priver de ce droit

(1) Si les parties dans une cause transigent sur une demande, le Demandeur promettant de ne pas rapporter l'action en cour, à la condition que le Défendeur paie les frais, et si les frais ne sont pas payés avant le jour fixé pour le rapport, le Demandeur peut la rapporter et procéder pour les frais *Darche et al.*, vs. *Dubuc*, C. S. Québec, 28 avril 1851, BOWEN, juge en chef, MEREDITH, juge. 2 *R. J. R. Q.*, p. 470.

il faudrait ou une convention expresse ou un règlement créant novation. Il est vrai que la demande de distraction de dépens ne peut priver la partie du droit de transiger sur son procès mais, si une des conditions de la transaction est que les frais seront payés par son adversaire, celui-ci doit avoir égard à la demande faite par le procureur et ne régler les frais qu'avec lui. Le procureur peut en demander la distraction par la déclaration, et, même s'il ne fait cette demande que lors du jugement définitif, la cour la lui accordera, malgré la saisie qui pourrait en avoir été faite par un tiers pendant l'instance, et ce point a été décidé ainsi dans la cause de *Gauthier* vs. *Lemieux*, (1). Les Défendeurs ayant injustement refusé au Demandeur la concession du banc, et se soumettant après l'institution de l'action à sa demande, devaient payer les frais et pour les recouvrer le Demandeur était justifiable de rapporter en cour son action pour obtenir un jugement exécutoire contre eux.

BOSSÉ, pour l'Intimé : La preuve établit de la manière la plus claire tous les faits sur lesquels le jugement est fondé ; il est prouvé que, lors de la passation du bail le Demandeur convint de se rendre à Québec pour discontinuer son action, qu'il ferait taxer ses frais, que les $21, prix du banc, dont il se trouvait débiteur vis-à-vis la fabrique, irait en compensation des frais jusqu'à ce montant, si toutefois ils s'élevaient à cette somme, que, s'ils n'atteignaient pas cette somme, l'Appelant rembourserait la différence à la fabrique, mais que, s'ils l'excédaient, qu'alors la fabrique paierait cet excèdant. Il est également prouvé que l'Appelant s'est rendu chez ses avocats le jour du rapport de l'action, et qu'il leur a dit de la discontinuer, et, à deux reprises différentes, il a avoué avoir donné les mêmes instructions à ses avocats. Aussi, s'est-on à peu près borné, de la part de la demande, à prétendre que les conclusions de l'action demandant une condamnation de dépens à être distraits, l'arrangement fait le 29 avril, ne pouvait pas avoir l'effet de la discontinuer quant aux frais. Cette prétention n'est certainement pas bien fondée : car, en admettant même que le Demandeur eût été insolvable ; en admettant encore que les procureurs n'eussent pas eu en mains les $21 qui étaient à peu de chose près le montant de leurs frais, dans ce cas même le Demandeur aurait-il encore pu transiger sans le concours de ses procureurs. Si l'action avait été entrée par

(1) Les frais dans nne poursuite ne peuvent être saisis par un créancier du Demandeur, même si le procureur du Demandeur n'en a pas demandé la distraction par la déclaration, l'avocat pouvant demander et obtenir cette distraction par motion faite lors du jugement et après la saisie-arrêt. *Gauthier* vs. *Lemieux*, C. S. Québec, 14 avril 1852, BOWEN, juge en chef, DUVAL, juge, MEREDITH, juge. 3 *R. J. R. Q.*, p. 179.

les procureurs, sans l'autorisation de leur client, pour le recouvrement de leurs frais, ils auraient dû le déclarer dès le rapport de l'action, et dire que l'arrangement qui avait eu lieu avait été fait collusoirement entre les parties, mais rien de cela n'a eu lieu, toute la procédure en Cour Supérieure a été faite au nom de l'Appelant, et c'est encore en son nom que le présent appel est interjeté. (1)

Jugement confirmé. (13 *D. T. B. C.*, p. 66.)

CASAULT et LANGLOIS, pour l'Appelant.

BOSSÉ et BOSSÉ, pour l'Intimé.

CORPORATION MUNICIPALE.—INTERET.

SUPERIOR COURT, Montréal, 31 Octobre, 1862.

Before MONK, Justice.

DOUGLASS, et al., *vs.* THE MAYOR, ALDERMEN AND CITIZENS OF MONTREAL.

Jugé : Que dans une action contre la Corporation de Montréal, pour dommages causés dans une émeute, les intérêts seront accordés du jour de la signification ; et non pas comme dans une action ordinaire pour injures de la date du jugement. (2)

This action was brought to recover damages, by reason of the mills leased to Plaintiffs, in the city of Montreal, and the property therein contained, having been destroyed by fire caused by a mob. (3) A similar judgment to that in Watson's case was rendered on the 6th September, 1861, in this case, on an appeal instituted by the present Plaintiffs from a judgment of the Superior Court, Montreal, of 31st December, 1859, dismissing Plaintiff's action. An *expertise* consented to by the parties in order to ascertain the amount of damage, was ordered by the judgment rendered in appeal ; and a report was subsequently filed by the experts, fixing the damages at $11,221. The case being inscribed on the merits, a motion was made for the homologation of the report.

(1) L'Intimé cita les autorités suivantes : Guyot, *Répertoire de jurisprudence*, vbo *Distraction de dépens ;* Nouveau Dénisart, vbo *Distraction de dépens ;* Dictionnaire de législation, vbo *Frais et dépens ;* Pothier, *Contr. de mandat.*, nos 135-36 ; Bioche, vbo *Dépens*, n° 78 ; Dalloz, vbo *Frais et dépens*, n° 144 ; Sebire et Carteret, *Encyclopédie du droit*, 413, n° 36.

(2) Ces dommages étaient payables par la cité sous les dispositions de la s. 58 du ch. 128 des S. du C. de 1851, 14 et 15 V. reproduites dans 7 *R. J. R. Q.*, p. 322.

(3) The action of the owner of the mills Watson, is reported 10 L. C. Reports, p. 426. See also *Carson* vs. *The Mayor, Aldermen and Citizens of Montréal*, 7 *R. J. R. Q.*, p. 321.

MONK, Justice: The principle on which this case rests has been already decided in the Court of Appeals. The report of the experts is regular and appears to be well founded. The only question now before the court is as to whether interest should be allowed from the date of the judgment as in ordinary actions of damages, or whether it should run from the date of service of process. I hold that Plaintiffs are entitled to interest, at least from service of process, the action being to obtain indemnity for property destroyed, for the payment of which Defendants were liable under the law. The Plaintiffs have invoked that law and demanded indemnity which Defendants were bound to pay, namely, the value of the property destroyed. This action therefore is not to be considered as an ordinary action *d'injures;* and it might be a question whether they were not entitled to interest from the date of the loss. Judgment homologating the report and giving interest on the amount from the date of service of process, 6 February, 1858, and costs of action and of *expertise.* (13 *D. T. B. C.*, p. 71.)

KERR and NAGLE, for Plaintiffs.

STUART, for Defendants.

ASSIGNATION.—COMPETENCE.

SUPERIOR COURT, Montreal, 23 octobre, 1862.

Before SMITH, Justice.

GRENIER, et al., *vs.* FOURQUIN, et al.

Jugé: Que sous la 26ème sec. des Stat. Cons. du Bas-Canada, chap. 82, service sur un Défendeur dans la cité de Montréal, et sur les autres Défendeurs, héritiers de leur père, dans un autre district, est valide; nonobstant que l'obligation du père eût été consentie dans un dictrict où il avait, ainsi que tous les autres Défendeurs, son domicile. (1)

This action was brought upon an obligation made on the 15th November, 1859, at St. Michel d'Yamaska, in the District of Richelieu, to which Michel Fourquin, the father of Defendants, became a party as *caution solidaire.* The action was served upon one Defendant personally in the city of Montreal, and an *exception déclinatoire* was filed by five of the Defendants, on the ground that the court had no jurisdiction, the cause of action having originated out of the District of Montreal, and they having all been served with process in the District of Richelieu.

SMITH, Justice: The question to be decided is whether

(1) V. art. 38 C. P. C,

Defendants pleading by exception, are properly brought into court so as to give it jurisdiction. It was contended on their behalf that, as each heir was only liable for his proportion of the debt due by the common ancestor, Defendants could not be brought into court together, or need not be so; and that, therefore, the service was only good as to the Defendant personally served within the District of Montreal. I hold that the section of the statute covers this case, and that the service on the other Defendants at their domicile in another District is good. Exception dismissed. (13 *D. T. B. C.*, p. 72.)

ARCHAMBAULT, for Plaintiffs.

LEBLANC and CASSIDY, for Defendants.

AMENDEMENT A UN RETOUR D'HUISSIER.—INSCRIPTION DE FAUX.

SUPERIOR COURT, Montreal, 20 mai et 27 septembre 1862

Before: BADGLEY J., SMITH, J., et MONK J. A.

HOBBS, Plaintiff, *vs.* SEYMOUR, et al., Defendants.

Jugé: 1o. Qu'il ne sera pas permis à un huissier qui n'est pas partie à l'action, de faire motion pour amender son retour, mais qu'il peut le faire par requête. (1)

2o. Que, lorsqu'une inscription de faux a été produite, fondée sur ce que le retour de l'huissier de la signification du writ certifie qu'il avait servi deux des Défendeurs, associés, résidents à Ottawa, à leur bureau ou lieu principal de leurs affaires dans la cité de Montréal, et acte avait été accordé au demandeur de son admission, "que tels défendeurs n'a-"vaient aucun bureau ou lieu principal d'affaires dans la cité de Mont-réal," une réponse du Demandeur aux moyens de faux, alléguant que l'inscription de faux était inutile en conséquence de l'admission, et que le retour tel qu'amendé constatait un service suffisant, sera renvoyée sur défense en droit; et que l'on ne pouvait s'enquérir de la validité du retour amendé sur telle réponse.

This was an action brought against Fuller and Jones, copartners, residing at the city of Ottawa, as makers, and one Seymour, a resident of Montreal, as indorser of a promissory note payable at Ottawa. By his return, the bailiff certified having served Defendants, Fuller and Jones, with the writ and declaration, "at their office or general place of business, at Montreal." These Defendants filed an exception *à la forme*, on the ground of there being no legal service. On the first day of term following the service, 17 May, 1862, a motion was made for leave to inscribe *en faux* against the return, and, on the same day, the bailiff moved to be allowed to amend his return by striking out the words "the St. Lawrence Hall Hotel." On the 20th May, the Court (BADGLEY,

(1) V. art. 79, 80, 117 et 159 C. P. C.

J.) granted leave to inscribe *en faux*, and rejected the bailiff's application to amend, on the ground that, not being a party to the record, he could not make a motion in the cause. On the 26th May, the Plaintiff prayed *acte* of his admission, that Fuller and Jones "had no office or general place of business at the city of Montreal," and, on the same day, the *moyens de faux* were filed. By his answer to these *moyens*, Plaintiff alleged that, by the admission, an inscription *de faux* was rendered unnecessary, and that the service as made, was good, notwithstanding the admission. To this answer a demurrer was filed, on the ground that it was competent to the parties to inscribe *en faux* notwithstanding the admission, and that the validity of the return as amended could not come up on the answers to the *moyens de faux*. On the 27th September, 1862, on petition by the bailiff, he was allowed (Monk, J. A.,) to amend his return on payment of the costs incurred on the inscription *de faux*.

Here follow the remarks made by Honorable Judge Monk in rendering that judgment. This was an action against two persons doing business at Ottawa. The bailiff returned that he had made a personal service on one of the Defendants, at the St. Lawrence Hall, *their usual place of business*, Defendants fyled for plea to the action a *demurrer* and an *exception à la forme*, and an *inscription de faux* against the bailiff's return, on the grounds that as Defendants did business in Ottawa, the St. Lawrence Hall could not be their usual place of business, as returned by the bailiff. The bailiff immediately presented a motion in Court before M. Justice Badgley, to amend his return, admitting that he had made a mistake. This motion was rejected, it being decided that the bailiff could not come into the cause by a motion. The case, at the present stage, comes up on the petition of the bailiff to be allowed to amend his return. The Court will grant this petition on payment of all costs occasioned by his irregularity. Petition granted.

On the same day, 27th September, 1862, the Court *Smith* J., maintained the demurrer on the grounds therein alleged. (13 *D. T. B. C.*, p. 75 et 7 *J.*, p. 46.)

CROSS and BANCROFT, for Plaintiff.

T. McCORD, for Fuller and Jones.

PROCEDURE.—DEFENSE EN DROIT.

SUPERIOR COURT, Montreal, 31st October, 1862.

Coram SMITH, J.

ADAMS *vs.* FLEMING, et vir.

Jugé : **Que lorsqu'une femme séparée de biens est poursuivie comme faisant commerce sous le nom de "A. & Co.," son mari étant mis en cause seulement afin de l'autoriser, un allégué dans la déclaration que " les Défendeurs sous le nom de A. & Cie, firent leur certain billet pro- " missoire," est suffisant, et une défense au fonds en droit fondée sur ce qu'aucune dette contre la femme n'a été alléguée dans la déclaration sera renvoyée.**

In this action, Defendants were described as " Mary W. Fle- " ming, wife of James F. Arthur, of the city and District of " Montreal, trader, duly separated as to property from her " said husband, by contract of marriage, and by him duly " authorized, and the said James F. Arthur, for all the pur- " poses of such authorization, *marchande publique*, doing bu- " siness as such, in the said city of Montreal, under the name " and firm of Arthur & Co." The declaration set up that, on a certain day, " the Defendants, Arthur & Co., made their cer- " tain promissory note, etc." A *défense au fonds en droit* was filed by the wife, on the ground that no debt against her was set up, and no allegation made that the note sued upon was her note.

SMITH, Justice: The husband is in the action only for the purpose of authorizing his wife. She is the real and sole Defendant. There is an *s* too much in the declaration, but there is enough alleged to shew that the wife who was doing business under the style of "Arthur & Co.," made it, and the demurrer must be dismissed with costs. (13 *D. T. B. C.*, p. 78.)

DUNLOP, for Plaintiff.

BEDWELL, for Defendants.

OPPOSITION EN COUR DE CIRCUIT.—PROCEDURE.

BANC DE LA REINE, EN APPEL, Montréal, 1 décembre, 1862.

Présents: AYLWIN, DUVAL, MEREDITH, MONDELET et BERTHELOT, Juges.

LAMOTHE, Appelant, et GARCEAU, Intimé.

Jugé: 1o. Que, dans la Cour de Circuit, rien n'exige qu'une opposition afin d'annuler soit enregistrée au greffe avant que d'être signifiée à l'huissier. (1)

2o. Que la 26e règle de pratique de la Cour de Circuit n'est pas à peine de nullité, quant aux chiffres employés dans un rapport de signification.

3o. Qu'à défaut d'heure fixée pour le rapport d'une opposition, elle doit être accueillie si elle est produite au greffe au jour fixé, pendant les heures du Bureau.

L'Appelant ayant produit une opposition afin de distraire à la saisie de certains effets par l'Intimé sur le nommé Péloquin, l'Intimé fit motion, en Cour Inférieure, la Cour de Circuit pour le District de Richelieu, que cette opposition fût renvoyée; " 1o. Parce que l'opposition n'a jamais été enregis- " trée au greffe ni dans les registres de cette cour, et qu'il " n'existe tant sur l'original que sur la copie d'icelle annexée " au rapport de l'huissier saisissant, Charles Turcot, aucun " certificat contenant tel enregistrement, et que, dans le cas " même où tel certificat existerait sur l'original il n'existe pas " sur la copie, que jamais copie du certificat n'a été signifiée à " l'huissier saisissant, et qu'il y aurait variance essentielle " entre la copie et l'original; 2o. Parce que l'opposition n'a " été rapportée et produite au greffe de cette cour, qu'entre " les trois et quatre heures de l'après-midi du jour fixé pour " son rapport, et que, par conséquent, elle n'a été rapportée ni " produite dans le temps prescrit par la loi et les règles de " pratique; 3o. Parce qu'aucun retour ou rapport d'huissier, " en forme authentique, ne constate la signification qui aurait " dû être faite, à une date certaine et précise, de l'opposition " à l'huissier saisissant." Jugement fut rendu comme suit, par son Honneur le Juge Bruneau: " La Cour, après avoir mûre- " ment délibéré sur la motion du Demandeur, tendant à faire " rejeter l'opposition filée en cette cause par l'Opposant, pour " les raisons, motifs et considérations y allégués, accorde la " motion, et déclare l'opposition informe, irrégulière, illégale, " nulle et de nul effet, et ordonne qu'elle soit considérée " comme non-avenue et mise de côté."

MEREDITH, Justice: The opposition of Appellant was dismissed on a motion, in support of which three grounds were

(1) V. art. 1084 C. P. C.

assigned. As to the 1st ground, it appears that the original of the opposition was registered; but that the copy served on the bailiff, bearer of the execution, did not show that the original had been registered, and, as to this point, I can only say that I know of no law, or rule of practice, which rendered it necessary that the copy should show that the original had been registered; indeed, I am not aware that the Plaintiff, under our system, was bound to cause the opposition to be registered before the date of the return. The 2d objection as to the hour at which the opposition was returned cannot be maintained. The judge ordered the opposition to be returned on the 1st of May. It was returned during office hours on that day, and that sufficed. The wording of the 3d objection is somewhat ambiguous; but, from what was said at the argument, I believe the objection to be, that that part of the certificate establishing the service of the opposition, is in figures. The rule of practice relied on, requires "the manner, place and time of service" to be in letters. The certificate of service in this respect is regular. The time and place of the service are described in letters, and the figures, "1862," added to the letters, although unnecessary, are not injurious. It is true that the date of the return is in figures, but the rule of practice does not require the date to be in letters. Upon the whole although I am very averse to the disturbing of judgments on points of practice, it nevertheless seems to me that the Appellant whose opposition was dismissed, is entitled to relief.

BERTHELOT, Juge: L'Appelant s'est porté opposant, par opposition afin de distraire à la saisie et vente de certains effets mobiliers saisis sur Joseph Péloquin, à la poursuite de l'Intimé, demandeur, contre ce dernier, sur jugement rendu par la Cour de Circuit du district de Richelieu, dans une cause appelable. L'opposition, datée du 24 avril, 1862, fut accordée le même jour par l'Hon. Juge Bruneau, avec ordre de la rapporter devant la cour, *jeudi le premier de mai alors prochain.* Le certificat du greffier fait voir qu'elle a été enregistrée le même jour, et qu'elle a été rapportée le 1er mai. Le 8 mai, l'Intimé fit motion pour faire rejeter cette opposition. l'Appelant a prétendu que c'était par une exception à la forme que l'intimé aurait dû faire valoir ces moyens. Mais ce n'est pas le cas, parce que ce sont des moyens qui n'attaquent pas la forme ou le libellé de l'opposition, mais bien seulement les procédures extrinsèques qu'il fallait suivre pour la mettre régulièrement devant la Cour. Quant au mérite des moyens en eux-mêmes, je ne les crois pas fondés. Le premier, parce qu'il n'y a aucune règle de pratique écrite ou par usage qui exige l'enregistrement des oppositions de cette espèce dans les

causes appelables. Il y avait bien autrefois une pareille règle de pratique introduite par usage et non écrite, mais elle n'affectait que les oppositions dans les causes du Terme Inférieur, non appelables, et au dessous de £11 2 2. C'était une règle de pratique d'un caractère bursal, pour assurer le paiement des émoluments du protonotaire ou greffier. Le second moyen me paraît sans aucun fondement. Certainement que l'Opposant avait toute la journée du 1er mai pour rapporter son opposition. Il n'y a aucune règle de pratique qui l'obligeait de la rapporter à 10 heures du matin, plutôt qu'à 3 heures de l'après-midi, pourvu que ce fût entre heures d'office, suivant la règle de pratique no 4. Et, d'ailleurs, le fiat du Juge ne l'obligeait à rien de plus, sans mention d'aucune heure en particulier, tous les jours du terme de la Cour de Circuit, et tant que la Cour n'est pas ajournée, l'on reçoit des retours, et il ne parait pas, par le certificat du greffier, que l'opposition ait été rapportée au greffe, après l'ajournement de la Cour le 1er mai. Quant au troisième moyen, il me paraît que le retour de l'huissier qui a signifié copie de cette opposition à l'huissier saisissant, Charles Turcot, est suffisant. La règle de pratique No 26, (1) n'exige pas que la date du retour soit en lettres. Cela étant, il s'ensuit que le corps du retour est bon, puisqu'il y dit qu'il a fait la signification "*le vingt-cinquième jour d'avril courant*, (1862) *entre huit et neuf heures de l'avant-midi.*" Cette expression. *courant*, est suffisante avec la date du retour en chiffres, puisque celle-ci suffit pour lui donner toute la qualification nécessaire d'après le sens et la signification que l'on attache au mot *courant*, dans le langage grammatical et ordinaire. Quant à la règle No 26, elle n'est pas à peine de nullité, et d'ailleurs, comme dit Le Merle, *fins de non recevoir*, " Point de nullité sans griefs." Et ici il n'y en a pas, et puis les nullités ne se supposent pas, il faut qu'elles soient déclarées. Ce que ne fait pas la règle No 26. Il serait peut-être à propos d'informer l'avocat de l'Intimé que, s'il eût réussi, la Cour ne l'aurait pas cru avoir droit à l'honoraire d'un factum puisqu'il ne s'est pas donné la peine d'en faire un, mais seulement de copier sa motion, sans même lui faire un endossement pour cette Cour. J'ajouterai, que nous avons dans le dossier la preuve *materielle* que la signification a été faite le 24 avril 1862. L'opposition a été accordée et signée par le Juge Bruneau, le 24 avril. Son greffier certifie que l'opposition a été rapportée le 1er mai. Or, comme il n'y a qu'un seul mois d'avril dans l'année, et que le retour mentionne que c'est le 24 avril courant qu'il a signifié, il s'en suit que nous avons la

(1) Règle 26. "That every certificate of service, shall particularly describe " the manner, place and time of service in letters."

preuve que la signification a eu lieu en avril, 1862. Le jugement de la Cour d'Appel est comme suit : La Cour considérant que l'opposition afin de distraire dont il est question dans le jugement rendu le 12 mai 1862, par la Cour de Cicuit, pour le district de Richelieu, était accompagnée du sursis de l'honorable J. C. BRUNEAU, en date du 24 avril 1862, ordonnant à l'huissier saisissant, Charles Turcot, de surpendre ses procédés sur l'exécution mentionnée dans la dite opposition, et de faire son retour devant la Cour de Circuit, jeudi le premier jour de mai alors prochain, et que conformément à ce sursis, l'opposition a été rapportée au greffe de la cour avant 4 heures P. M., le dit 1er mai, avant la clôture du greffe, suivant qu'il appert par le certificat du greffier de la cour, et conformément à la règle de pratique n° 4, pour la Cour de Circuit. Considérant, de plus, qu'il n'était pas nécessaire, par la loi ou aucune règle de pratique, de faire enregistrer l'opposition. Considérant encore qu'il appert de la procédure qu'il y a eu signification légale et suffisante d'une copie certifiée de l'opposition, le 25 avril 1862, par l'huissier, François Coderre, ainsi qu'il est exigé par la clause 208 des statuts refondus du Bas-Canada, et qu'en conséquence il y a mal jugé dans le jugement de la Cour de Circuit, pour le district de Richelieu en date du 12 mai 1862, rejetant sommairement l'opposition ; a infirmé et infirme le dit jugement, et procédant à rendre le jugement que la Cour de Circuit aurait dû rendre, renvoie la motion de l'Intimé Demandeur en la Cour de Circuit, en date du 8 mai dernier. (13 *D. T. B. C.*, p. 88, et 7 *J.*, p. 115.)

GIROUARD, pour l'Appelant.

PICHÉ, pour l'Intimé.

ASSIGNATION D'UNE SOCIETE EN NOM COLLECTIF.

SUPERIOR COURT, Quebec, 4th February, 1863.

Before STUART, Justice.

POSTON *et al.*, *vs.* HALL, *et al.*,

Jugé : Que la signification d'une action à la place d'affaires d'une société dans un district différent de celui d'où le writ a émané, et d'où le droit d'action a pris naissance, même dans le cas où l'un des membres de telle société est domicilié dans le district où l'action est intentée ; est insuffisante pour donner juridiction au tribunal. (1)

The Plaintiffs who were merchants and copartners, trading at Quebec, sued Defendants, G. B. Hall, of the parish of Beauport, in the district of Quebec, and Auguste Larue, and the

(1) V. art. 34-38-60 C. P. C.

Honorable Joseph E. Turcotte, of Three Rivers, in the district of Three Rivers, as partners, carrying on business as such in the parish of St. Maurice, in the district of Three Rivers, under the name and firm of A. Larue and Co., for $694.65, amount of their certain promissory note, made at the city of Three Rivers, and payable at the bank of upper Canada, at Quebec. The writ was directed to all and every the bailiffs of our Superior Court for Lower Canada, appointed for the district of Three Rivers, and was served by a bailiff of the district of Three Rivers, who certified "j'ai personnellement signifié le "présent writ et la déclaration y annexée à George B. Hall, "Joseph E. Turcotte et Auguste Larue, les associés et Défen-"deurs, y nommés, parlant à Auguste Larue, un des dits "Défendeurs, au bureau de la dite société, étant leur bureau "d'affaires en la cité des Trois-Rivières, dans le dit district, &c." The Defendants pleaded, by exception *déclinatoire*, that they were not bound to answer Plaintiffs demand, because the cause of action did not arise in the district of Quebec, because the firm of A. Larue and Co., had neither an office nor a place of business in the district of Quebec, and because none of Defendants had been served with the action either personally or at domicile in the district of Quebec. To this plea Plaintiffs demurred for the following reasons: Because it was not alleged, in the exception, that, at the time of the commencement of the action, none of Defendants were domiciled in the district where the same had been commenced, to wit: in the district of Quebec; because it was alleged, in the writ and declaration, that George B. Hall, one of the parties to whom the writ and process was addressed, and a Defendant, was, before and at the time of the commencement of the suit, domiciled within the district of Quebec, by reason whereof, and of the legal service of process upon all the Defendants, the court had jurisdiction to hear, try and determine the action, and to compel Defendants to answer Plaintiffs' demand.

DUNBAR, for Plaintiffs, argued that the court had juris liction and that the service was sufficient, and referred the Court to Con. Stat. for Lower Canada, cap. 82, sec. 26, wherein it is provided that: "Any action &c., may be commenced "at the place where the terms of the Superior or Circuit "Court are held in any district: provided the cause of such "action, suit or proceeding respectively arose within such "district or circuit, or the Defendant or one of the Defen-"dants, or the party or one of the parties to whom the origi-"nal writ, order or process is addressed is domiciled or served "personally with such writ, order or process in such district "&c., and provided all the Defendants or parties are legally "served with process, and not otherwise &c." And also to the

Con. Stat. L. C. cap. 65, sec. 4, sub sec. 3, wherein it is provided that: " The service of any summons or process for any " claim or demand upon any existing partnership liability at " the office or place of business of such existing partnership, " carrying on business within this province, is and shall be held " to have the same and equal effect as a service made upon the " members of the said partnership, personally &c." In this case, the manner of service pointed out by these two statutes had been strictly complied with, Defendants, who were partners had been legally served at the place of business of their firm, and one of them, Hall was domiciled in this district. The parties were properly before the court, and the court had *jurisdiction* over them. He also referred to the Code Napoléon, Proc: Civ. no. 59, where it was provided that, when there were several Defendants the action could be brought at the place where one of them was domiciled.

LANGLOIS, for Defendants, referred to the same statutes, but urged that they should have a different interpretation from that put upon them by Plaintiff's Counsel, for, if that interpretation were correct, Hall, one of Defendants might be sued here in Quebec, served in Three Rivers, at the place of business of the partnership whereof he was a member, and might still know very little about the action. The true meaning of the act, as he understood it, was that where there were several Defendants, residing in different districts, the action might be brought in any district where personal service of one of the Defendants could be effected, or where legal service at domicile could be made if one of the Defendants was domiciled in such district.

STUART, Justice: The question is one of jurisdiction; as to whether or not the court here, in Quebec, can take cognizance of or exercise jurisdiction over the parties. The promissory note in question was made in Three Rivers and payable in Quebec. The parties Defendant resided, one in the district of Quebec, the other two in Three Rivers, at which place Defendants carried on business in partnership. There is a certain ambiguity about the law, but, upon consulting with Judge Taschereau, we have concluded to give it a reasonable interpretation. If one of Defendants had been served here, either personally or at his domicile in the district of Quebec, then this court would have jurisdiction. But the service was made at the place of business of the firm in Three Rivers, none of the Defendants have been served either personally or at domicile in the district of Quebec, and the simple fact that one of the Defendants had, at the time of the commencement of the action, a domicile in this district, is not in itself sufficient to give this Court Jurisdiction. If the writ had been served

upon Defendant Hall, at his domicile in this district, or upon Hall or either of the other Defendants personally, within the limits of the district of Québec, then the service would have been good. The words of the statute " if domiciled " must be held to signify, not only that one of the Defendants should be domiciled in this district, but that he should be served at such domicile. JUDGMENT : Exception *Déclinatoire* maintained, and demurrer dismissed. (13 *D. T. B. C.*, p. 127.)

SECRETAN and DUNBAR, for Plaintiffs.

CASAULT, LANGLOIS and ANGERS, for Defendants.

ACTE AUTHENTIQUE.—FAUX.—ABROGATION DES LOIS PAR DESUETUDE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 9 décembre 1862.

Before : AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

DESFORGES, Appellant, and DUFAUX, et all., Respondents.

Jugé : 1o. Que dans le Bas-Canada une loi peut être abrogée par désuétude ; et que les provisions de l'ordonnance de 1498, et de l'ordonnance de Blois (1579) en autant qu'elles requièrent la présence du second notaire à l'exécution d'un acte notarié, ont été ainsi abrogées, et qu'en conséquence un acte notarié n'est ni faux ni nul parce que la minute n'a été contresignée que plusieurs années après son exécution, la minute ayant été d'ailleurs signée des parties ; le tout fait sans fraude, et la minute présentée au second notaire par le notaire instrumentaire lui-même. (1)

2o. Que, dans l'espèce, le contreseing du second notaire après la mort de l'estimateur, Dorval, qui n'était pas un témoin nécessaire au préambule de l'inventaire impugné de faux, ne pouvait être un moyen de faux sérieux.

3o. Que la protestation d'un tiers, cessionnaire d'un créancier d'une partie à l'acte, n'avait pas dû nécessairement, dans l'espèce, empêcher le second notaire de contresigner validement la minute qui était présentée par son contreseing par le notaire instrumentaire lui-même.

4o. Que la copie de la minute n'ayant été produite comme exhibit que le 23 mars, 1858, après le contreseing du second notaire, qui avait eu lieu le 16 du même mois, ne pouvait pas pour cette raison être considérée comme fausse au jour de sa production.

This was a petitory action, brought in the Superior Court, Montreal, by J.-Bte. Sancer, (Appellant being his widow.) praying that he be declared to be subrogated in the rights of one of the Defendants, Louise Herse, (Madame Grothé) his debtor, under certain judgments, as proprietor of an undivided half of certain real property situated in the city of Montreal.

(1) Ces lois ont été changées par l'art. 1208 C. C., qui n'exige qu'un *seul* notaire lorsque toutes les parties signent, et un témoin avec le notaire lorsque toutes les parties ne savent pas signer. L'article 843 exige deux notaires ou un notaire et deux témoins pour le testament authentique.

The declaration set up a will of the late Joseph Roy, which was alleged to be null; Defendants invoked an inventory made before Brault, and his colleague, notaries, of date, the 16th October, 1848, the preamble of which was signed by the party whom Plaintiff claimed to represent. An inscription *en faux* was filed by Plaintiff, as well against the minute, as against the copy of this inventory; the *moyens de faux* being founded mainly on the fact that the inventory was countersigned by the second notary some ten years after its date, and after the death of one of the appraisers mentioned in the inventory, and after protest and notice to the second notary not to sign it. These *moyens* were declared by the Court below to be insufficient.

MONDELET, Justice, *dissenting*: La question est de savoir si un inventaire, ou préambule d'inventaire, dans lequel il est déclaré qu'il est reçu pardevant notaires, et qui n'a été signé par le second notaire, c'est-à-dire contresigné, que dix ans après, est ou n'est pas faux. La question ici est non seulement d'un haut intérêt pour la société entière, car on peut dire qu'elle est une question d'ordre public, mais qu'elle l'est au plus haut degré pour les parties auxquelles on oppose le préambule de cet inventaire, dans lequel on prétend trouver, à leur encontre, une reconnaissance d'un testament qui affecte essentiellement leurs droits à partie de la succession d'un testateur. Il est constant que cet inventaire ne fut, lors de sa confection, signé que par un notaire, savoir, C. A. Brault, il est également certain qu'il ne fut contresigné par le second notaire, M. Houlé, que dix ans après. Y a-t-il faux ? Y a-t-il nullité ? On s'est inscrit en faux contre l'original de l'inventaire. Il y a suivant moi un faux, puisqu'il est faux que l'inventaire ait été reçu *pardevant* deux notaires comme l'exigent les ordonnances. Il est faux puisque l'assertion pardevant les notaires soussignés, etc., est une fausseté, qu'i n'y avait qu'un seul notaire, et que le second n'a ni comparu ni signé alors. Il y a nullité, l'acte du moins est nul comme acte notarié, puisqu'il n'est pas reçu par devant deux notaires, ou un notaire et deux témoins. Nous n'avons pas à nous occuper de la question de savoir, si cet acte d'inventaire ou préambule peut avoir aucun effet comme acte sous seing privé, nous n'avons rien à faire à cela. La seule difficulté qu'il puisse, suivant moi, y avoir, est à raison des centaines et des milliers d'actes qui sont dans le même cas. D'abord je réponds que ce n'est pas là la question, et les inconvénients ne sont pas un moyen logique de décider un point de droit. Je dis en second lieu qu'un abus, une violation de l'ordonnance de Louis XII, et de l'ordonnance de Blois, ne peuvent être invoqués pour justifier cet abus, cette violation de la loi

surtout une loi comme l'est l'ordonnance, une loi d'ordre public. Ce qui à mon avis rend incontestable la proposition que l'acte est nul, c'est que l'art. 84, de l'ordonnance d'Orléans porte : " Seront tenus les notaires faire signer aux parties et aux témoins instrumentaires, (s'ils savent signer) tous actes et contrats qu'ils recevront, dont ils feront expresse mention, à peine de nullité des dits contrats et actes etc." Il est clair et manifeste que, si le contrat ou acte est reçu pardevant *un* notaire et deux témoins, la signature de ces témoins, (s'ils savent signer) *doit à peine de nullité* du contrat ou de l'acte être apposée avant celle du notaire qui complète et parfait l'acte. Or, le notaire en second n'est qu'un témoin, mais un témoin *qui* en vaut deux, et puisqu'il est seul, il ne doit pas avoir plus de privilege que deux témoins ordinaires. Les ordonnances l'ont exigé, à peine de nullité, pour deux fins bien importantes savoir : 1o pour empêcher le faux, protéger les parties et sauvegarder leurs droits ; 2o pour assurer aux parties les moyens de prouver les faux s'il s'en commet, ou du moins pour leur donner plus de moyens de faire cette preuve que si le notaire était seul. Or, est-il soutenable qu'on laisse, ainsi qu'on le voudrait, les parties à la merci d'un seul notaire, lorsque l'acte dit, qu'il est reçu pardevant deux notaires, tandis que l'article 84, de l'ordonnance d'Orléans, frappe de nullité un acte ou contrat si les témoins n'ont pas signé, ou été interpellés de le faire et mention de ce fait dans l'acte ou contrat avant que la signature du notaire recevant l'acte ou contrat y soit apposée. Je pense avoir envisagé cette question à peu près dans tous les points de vue les plus apparents, et je puis dire avec vérité que je n'ai éprouvé aucune difficulté à arriver à la conclusion qu'un acte qui doit être reçu par-devant deux notaires, et qui n'a été signé qu'après coup par le second notaire, qui n'était pas présent à sa rédaction, est faux et nul en même temps. Il y a dans le 13e tome de Toullier, p. 542 et seq. sous le titre " additions au tome VIII, Nos 74, 78, un article *ex professo* sur cette question qui vaut bien la peine d'être lu, médité et surtout appliqué. Il faut consulter aussi le 8e tome de Toullier, pp. 134 et 135, où est exprimée en termes énergiques l'opinion de M. le Chancelier d'Aguesseau, voir aussi la note 1, pp. 670 et 671, du même volume. Il résulte de cet article, *ex professo*, de Toullier, ce que les principes et la raison nous enseignent, non pas seulement comme une maxime, mais comme axiôme. 1° La nécessité de la présence du second notaire, ordonnance de Louis XII, de mars, 1498, art. 66, dont la sage disposition fut repétée en 1572, dans les art. 165-66, de l'ordonnance de Blois," afin d'obvier aux faussetés qui peuvent se commettre par ce regard." 2° Il est certain que l'absence du second notaire, lors de la rédaction ou confection de l'acte, et

qui ne signe qu'après coup, frappe l'acte de faux et de nullité. 3° La violation par les notaires des ordonnances et de la loi en général, la connivence même par faiblesse de certains tribunaux, n'ont pu faire que ces ordonnances soient tombées en désuétude. Les lois ne tombent pas en désuétude en raison de leur violation, mais par le laps de temps de leur inexécution, de consentement général, ce qui n'a pas été le cas dans l'espèce, car l'on n'a cessé de réclamer contre cet abus intolérable, d'ailleurs, cette vieille doctrine de désuétude devrait être repoussée comme illogique, illégale et dangereuse. La maxime tutélaire que les ordonnances et les lois ne peuvent être abrogées que par des ordonnances ou des lois, en fait justice. Il serait plus exact de dire que c'est la fausse doctrine de désuétude qui est tombée en désuétude. 4° Des ordonnances telles que celles de Louis XII et de Blois, ne peuvent être abrogées que par des ordonnances, il ne peut être question de désuétude. 5° Cela étant, et ces ordonnances étant lois ici, les juges n'ont pas de choix, ils doivent obéir à cette loi, ils la doivent proclamer, ils doivent l'appliquer quelles qu'en soient les conséquences. 6° Ce sera à la législature à intervenir, non pas pour faire une loi, elle existe, mais pour remédier au mal qui a pu et pourrait par la suite, résulter de la violation par les notaires des ordonnances à cet égard. Au reste qu'on ne s'effraie pas si la Cour d'Appel décide dans le sens contraire à l'acte; la législature pourra facilement et devra à sa prochaine session intervenir et déclarer qu'attendu un usage qui existe depuis longtemps dans le pays, tous les actes qui n'auraient été signées qu'après coup par le second notaire vaudront, &c. S'il était logique de recourir aux arguments *ab inconvenienti*, on ne pourrait en apporter un plus frappant que de livrer les familles à la négligence des notaires, et par là, vingt ans, et trente ans après la confection d'un acte, voir des familles ruinées ou privées de leurs droits. Je pense donc que la Cour d'Appel doit déclarer l'acte faux; infirmer le jugement de la cour de première instance; maintenir l'inscription de faux et rejeter l'inventaire du dossier.

AYLWIN, Justice, *dissenting:* Stated in effect that he fully concurred in the argument of the learned Judge (MONDELET) and referred to the 13 Toullier, p. 542. The authority of Toullier following that of D'Aguesseau was decisive upon the point, that notwithstanding the continuous, nor to say insolent, attempts of the notaries in France, to resist the two ordinances of the kings of France, these ordinances were still in force. The 14th article of the *statuts et règlements de la communauté des notaires au châtelet de Paris*, and the *arrêt* of the parliament homologated 13th May, were insufficient to repeal two royal ordinances, and were moreover not to be noticed at

all in Canada where they were of no authority whatever. He was of opinion that whatever the *practice* may have been, and however extended, the conduct of the second notary could not be maintained. The *acte* impugned in this case was a *faux*, and was null and void as an *acte authentique* The maxim *toute énonciation fausse dans un acte public est un faux qu'on ne peut tolérer*, was more than a maxim, it was an axiom. There was, moreover, in the facts of this case, such glaring misconduct on the part of the notaries concerned as must deprive them of any excuse, more than ten years had elapsed since the paper in question stood amongst the notary's minutes simply as a *sous seing privé* paper, when, after the bringing of the action now before the court, and after a solemn protest served upon a second notary, but an *ex post facto* act, to the manifest detriment of the Appellant, the second notary had the audacity to sign, what now appears to be a *minute*. Thus, in the state in which the record stood, and with an advantage to which the Appellant was entitled, a change was operated by this signature, which altered completely that record, and which amounted to a forgery. If after the lapse of ten years,(one of the importants periods of prescription by our law in matters of real property) a piece of blank paper may be altered to a deed, then what period would be prescribed. If ten years will be allowed for such a practice it was impossible to state at what period it might not be tolerated, until the second notary was arrested by the hand of death. With the law of registration another uncertainly was added by the statement in the register of a deed, which was untrue as to time or as to the name of the notary *en second*; and above all, by the death of either of the notaries, the registration might be vitiated, and the paper certified and registered might become a mere *sous seing-privé* but no deed. The decision in the case of the Chancellier d'Aguesseau, extended as far back as 1728, only thirty one years before the conquest of Canada. On the 25 Ventôse an XI "la nullité des actes qui ne seraient pas reçus par deux notaires" was again enacted. Resistance to the legislature was still made by the notarial profession, and an attempt to sustain the attack by having recourse to the principle of the abrogation of a law by non usage or *désuétude*. The notaries were at last beaten down by the authority of Toullier, supported by the *arrêt* of the 25th January, 1841, by the *Cour de Cassation*, and it was only in 1843 that a law was passed which settled the point. He was decidedly for the reversal of the judgment of the court below.

BERTHELOT, Juge: La question agitée entre les parties en cette instance, soulève la question de savoir s'il y a aucun temps limité durant lequel il est obligatoire, (et à peine de

nullité,) pour un notaire instrumentaire de faire contresigner un acte reçu devant lui, pour lui donner tout le caractère authentique que doit avoir un acte notarié comme minute. Le contre-seing du second notaire est-il bon dix ans ou vingt ans après le jour que les parties se sont présentées devant le notaire instrumentaire, pourvu toutefois que la minute soit présentée au second notaire pour sa signature par le notaire instrumentaire, et avant qu'aucune partie à l'acte même se soit plaint du retard apporté au contre-seing du second notaire, mais lorsqu'un tiers créancier de cette partie s'était opposé au au contre-seing, car c'est dans cette dernière circonstance que la difficulté se présente, ainsi qu'on le verra par le récit des faits ci-après rapportés. Ou, faut-il que le contre-seing du second notaire ait lieu le jour même de la date de l'acte, et en présence des parties, et ce à peine de nullité comme faux et nul, ainsi qu'il a été prétendu. C'est sur une inscription de faux que la question se présente dans les circonstances suivantes. L'Appelante, Demanderesse par reprise d'instance, comme légataire universelle de J.-Bte Sancer, son mari, poursuivait les Intimés, et Mr. et Mdme Grothé, pour faire déclarer ces derniers propriétaires d'un immeuble pour une moitié indivise. Les Intimés qui se prétendent propriétaires de la totalité de cet immeuble, pour repousser l'action, en tant qu'ils y étaient concernés, ont invoqué par leurs plaidoyers, entre autres actes, un inventaire fait par Brault, et son confrère, notaires, le 10 octobre, 1848, et jours suivants et dont le préambule, en date du dit jour, 10 octobre, contenait une ratification expresse du testament de Joseph Roy, notaire, par Mr. et Mdme Grothé, dont l'Appelante entend exercer les droits et actions comme sa créancière, sur la moitié indivise du dit immeuble. Au soutien de leurs plaidoyers, les intimés produisirent, le 23 mars 1858, une copie authentique du préambule d'inventaire, en même temps que copie du dit inventaire. C'est alors que l'Appelante se porta Demanderesse en faux contre la pièce et l'original de la pièce produite par les intimés, comme leur exhibit no. 5, au soutien de leur plaidoyer. Après production de l'original du dit inventaire et préambule d'inventaire au greffe, accompagné du procès-verbal ordinaire, l'Appellante a articulé des moyens de faux qui peuvent se résumer aux trois suivants : 1° Que, le 15 mars 1858, l'original du dit inventaire ne portait pas la signature d'un second notaire, quoique la copie produite comme exhibit no. 5 des intimés portât la signature de Jean-Baptiste Houlé, comme notaire contre-signant. 2° Que, le 15 mars 1858, Amable Dorval, un des estimateurs au dit inventaire et préambule d'inventaire était mort depuis longtemps. 3° Que J.-Bte Houlé, n'avait contre-signé l'original que le 20 mars 1858, après avoir été notifié par J.-

Bte. Sancer, dès le 16 mars, par le ministère de Doucet, notaire, de ne pas le faire, et qu'il en avait aussi été notifié par madame Grothé, Marie Louise Herse. Par une défense au fonds en droit, les intimés ont soutenu l'insuffisance des moyens de faux, et par une défense en fait ils en ont nié la vérité. L'enquête faite constate qu'en point de fait, Houlé, le notaire en second, n'a contre signé le préambule du dit inventaire, et l'inventaire même, que du 16 au 19 de mars 1858, lorsqu'ils lui furent présentés par Mr. Brault lui-même, et qu'il le fit à la demande de ce dernier, et nonobstant la notification qui lui fut faite le 16 mars, de ne pas le faire. Il est également constaté par l'enquête qu'il est de pratique universelle dans le Bas-Canada que les actes notariés, à l'exception des testaments, sont reçus par le notaire instrumentaire, et ne sont contre-signés par le second notaire, qu'après leur confection et hors la présence des parties. Et indépendamment de cette preuve, il n'est pas de membre du barreau ou de Juge qui ne sache par lui-même que, de fait, cette pratique a été constante et universelle par tous les notaires du pays depuis un temps immémorial, et que, s'il fallait aujourd'hui déclarer comme faux tous les actes, qui n'ont pas été reçus et exécutés par deux notaires, au moment où les parties y ont consenti, il n'y en aurait probablement pas un seul qui pût être excepté depuis qu'il y a des notaires dans le pays. C'est un usage si public, si bien établi, que l'Appelant en plaidant devant cette cour a été obligé d'admettre que le second notaire peut contre-signer après coup, pourvu qu'il n'apparaisse point que c'est pour consommer une fraude. Or, comme la fraude ne se présume pas, et qu'il faut la prouver, c'était à lui de faire voir que Houlé n'avait contre-signé l'acte le 16 mars 1858, lorsque Brault le lui a présenté, que pour aider ce dernier à consommer une fraude, ce qui n'est nullement le cas, et ce que l'Appelant n'a pas même tenté de prouver. Et il ne suffisait pas de donner pour raison que Dorval, l'estimateur, était depuis décédé, et qu'il était informé que Mr. et madame Grothé n'avaient pas signé, tandis que le contraire a été prouvé. C'était au second notaire, à ne pas se laisser intimider par ces raisons en l'air, et à s'en rapporter à l'honneur de son confrère, comme cela se fait toujours. Mais, comme il est prétendu d'ailleurs qu'il y a faux du moment que le second notaire contre-signe après coup, et qu'il n'y a pas d'usage si bien établi à cet égard qui puisse équivaloir au rappel des lois qui exigent la présence de deux notaires pour la confection d'un acte notarié, il convient de citer ici les autorités pour établir qu'il y a telle chose qu'un usage assez universel pour faire regarder une loi comme rappelée ou tombée en désuétude, au point de dispenser de son observance. " L'usage ou la coutume a aussi beau-

" coup de force, soit pour interpréter la loi, soit pour ajouter " à ses dispositions, soit pour *les corriger ou les abroger*. Pour " établir un usage, cinq choses sont nécessaires : il faut qu'il " soit uniforme, public, multiplié, observé par la généralité " des habitants, réitéré pendant un long espace de temps. C'est " alors seulement que les usages forment *un droit non écrit*. " C'est aux Juges de décider, par le nombre et la qualité des " actes, si l'usage est établi, si la coutume est acquise, si elle " est prouvée, s'il s'est écoulé un temps assez long pour que le " public et le législateur en aient eu connaissance. L'usage ainsi " formé peut interpréter la loi, ajouter à ses dispositions ou " *les abroger*. La loi n'a pas de meilleur *interprète* que l'usage. " Ainsi, lorsqu'il s'élève des doutes sur le sens d'une loi, l'usage " doit être consulté, et la manière dont la loi a toujours été " *exécutée* en est le plus sûr interprête. Enfin *l'usage*, quand il " est *général*, peut *abroger* la loi, et nous suivons sur ce point " la doctrine de la loi 32, § 1 ff *de Leg.* parcequ'elle est fondée " sur la *raison*. Toutes les lois sont sujettes à tomber en dé- " suétude, dit l'illustre Chancelier d'Aguesseau ; et il est bien " certain que, quand cela est arrivé, on ne peut plus tirer un " moyen de cassation d'une loi qui a été abrogée tacitement " par un usage contraire.... Il ne faut pas oublier cette règle " du droit Romain : *Inveterata consuetudo pro lege non im-* " *merito custoditur*. ou *Leges, tacito consensu omnium, per* " *desuetudinem abrogantur*. Cette règle est également suivie " sous l'empire de notre nouvelle législation, ainsi que l'a plu- " sieurs fois décidé la Cour de cassation. " (1) Dans l'espèce actuelle, je crois que l'on peut dire que, non seulement il ne s'agit pas d'une loi tombée en désuétude, mais d'un article d'une ordonnance qui n'a jamais été mise à exécution et interprétée dans le sens rigoureux que l'Appelant veut lui donner, et qu'il y a, par conséquent, beaucoup plus de raison de dire qu'il faut la regarder comme abrogée par un usage contraire, universel, public, multiplié, constant et immémorial, et ce depuis que les notaires exercent dans la province. Voyons maintenant si tel usage, à l'encontre de ce que prescrivait les ordonnances, était bien reconnu dans l'ancien droit Français, avant le code, quant à la signature du second notaire. " J'ai dit ci-devant qu'un " seul *notaire* ne peut donner la forme authentique aux actes " qu'il reçoit, et qu'il faut que ces actes soient passés devant " deux notaires, ou devant un notaire et deux témoins : cepen- " dant, suivant les statuts des notaires de Paris, homologués " au parlement le 13 mai, 1681, il y a des actes que les no- " taires sont assujettis de signer comme seconds, sans pouvoir " le refuser, lorsqu'ils leur sont présentés par leur confrère,

(1) 1 Touiller, No 158, 159, 160 et 161.

" *quoiqu'ils n'ayent point été présents à leur passation.*"(1) Dans le pays, la chose se fait aussi d'après une entente, et par consentement unanime entre tous les notaires, sans le secours de l'action de la chambre des notaires. "Il ne faut " pas conclure de la faculté accordée aux notaires de faire " signer en second les actes à la passation desquels ils n'ont " pas assisté, qu'ils peuvent en user de même, quand, au lieu " de second notaire, l'acte est passé en présence de témoins. " Les règlements veulent en ce cas, que les témoins soient " réellement présents. Voyez les arrêts de 1703 et 1730, cités " plus haut." Bien que ces arrêts de règlement n'aient pas été enregistrés dans le pays, ils ne sont pas moins pour nous interprétatifs de l'état de choses existant en France lorsqu'ils ont été rendus, état de chose qui a été introduit dans le pays et par les notaires. C'est le cas de dire que l'exception prouve la règle, c'est-à-dire, que pour un acte exécuté devant deux notaires, il n'était pas nécessaire et à peine de nullité que le second notaire fût présent, à moins que ce ne fût un testament ou autre acte pour l'exécution duquel il était nécessaire que les deux notaires fussent présents, ainsi qu'il est mentionné au No. 79, de Denisart, conformément à l'article 289 de la Coutume, et à l'article 48 de l'ordonnance des testaments de 1735 qui l'exigent expressément.

Dans un autre passage Denisart rapporte que bien que dans l'usage, l'on exigeait la présence des deux témoins lorsque l'acte était passé devant un notaire et deux témoins, on n'exigeait certainement pas la présence du second notaire, à peine de nullité. Il est vrai que l'on ne trouve pas exactement quelle était la raison de cette différence, mais il n'y a pas de doute qu'elle existait et qu'elle s'est introduite de même dans la province, sans que l'on puisse en donner d'autre explication que celle de son existence." La disposition de la loi qui ordonne " que les actes seront reçus par deux notaires, ou par un " notaire assisté de deux témoins, est conforme aux anciennes " ordonnances : (2) mais elles n'avaient pas énergiquement pro- " noncé la peine de la nullité, des actes où cette importante " disposition n'avait pas été observée. Il en était arrivé qu'elle " était tombée presqu'en désuétude, et que son omission n'était " point tirée à la rigueur, si ce n'était à l'égard des testaments " et codiciles, et de quelques autres actes." (3) Toullier s'élève contre l'usage qu'il reconnaît avoir existé conformément à ce que Denisart rapporte comme ci-dessus dit, et les règlements

(1) Anc. Denisart, vbo *Notaires*, p. 443, no 75.

(2) Ordonnance de Louis XII du mois de mars 1498, art. 66, ordonnance de Blois, art. 165-66, déclaration du 14 février 1747, art. 1.

(3) 8 Toullier, n° 78.

et arrêts qui l'avaient sanctionné, mais il avoue qu'il avait fallu la nouvelle loi sur le notariat pour prononcer expressément la nullité des actes qui ne sont pas reçus par deux notaires, ou par un notaire assisté de deux témoins, et que, suivant la législation actuelle en France, il n'était pas plus permis de créer arbitrairement des nullités, qui ne sont pas établies par la loi, que de n'avoir pas d'égard aux nullités qu'elle a prononcées. Et, enfin, il est obligé d'admettre que nonobstant cette législation nouvelle, l'usage est encore en France plus fort que la loi à cet égard, et que les actes sont encore reçus par un notaire hors la présence du second notaire ou des témoins. Et ce, après avoir dit que tel était l'état de l'ancienne jurisprudence sur ce point. L'on ne peut douter, d'après ce que dit Toullier, que, sous l'ancien droit français, et sous la législation nouvelle à cet égard, il n'aurait pu nier que cet usage, si public, si universel et si uniforme, avait été plus fort que l'article d'une ordonnance tombée en désuétude et qui n'était pas d'ailleurs à peine de nullité, et que, par conséquent, un acte contresigné après coup dans ces circonstances ordinaires, n'est ni faux ni nul. Duranton énonce ainsi son opinion : " Mais quant à la " présence du second notaire à la rédaction de l'acte dans lequel " elle se trouve d'ailleurs mentionnée, elle n'a pas été con- " sidérée jusqu'à ce jour comme une condition de rigueur, sauf " ce qui est prescrit par les testaments pour acte public par " l'article 971 du code civil. Il est bien vrai que la loi de ven- " tôse ne fait pas cette *distinction* entre les testaments et les " autres actes ; qu'elle exige pour tous, qu'ils soient *reçus par* " *deux notaires, ou par un notaire assisté de deux témoins ;* " mais dans toutes les législations et dans tous les temps, des " lois ont été sujettes à tomber en désuétude, en tout ou en " partie, par l'effet d'un consentement tacite des peuples. Or " il est certain que la disposition de la loi de ventôse sur ce " point n'a pas été observée comme une de ces règles positives " dont on ne peut s'éloigner sans exposer l'acte à la nullité. " La société serait bouleversée si la nullité des actes authen- " tiques pouvait être demandée pour cause de cette inobser- " vation : et l'imagination s'effraie en songeant à l'innombrable " quantité d'inscriptions en faux et de demandes en nullité aux- " quelles donnerait lieu l'application littérale de la loi sur ce " point. C'est un mal sans doute qu'une disposition non légale- " ment abrogée, et surtout d'une loi si peu ancienne, ne soit " pas mieux exécutée ; il vaudrait mieux qu'elle n'existât pas : " aussi cette infraction a-t-elle été souvent signalée par des " esprits sévèrement attachés à l'observation des règles. Mais " enfin c'était au gouvernement, par l'organe du chef de la " justice, à faire cesser l'abus, si la disposition était réellement " utile ; *les citoyens ne sauraient être victimes de l'approbation*

" *tacite qu'il a donné par son silence dès les premiers temps de* " *la loi elle-même jusqu'à ce jour.*" (1) Avec combien plus de raison devons-nous tenir le même langage, et faire les mêmes raisonnements, à l'égard d'une loi qui n'avait pas plus d'observance en France, dès avant la cession du pays, qu'elle n'en a eue en cette province depuis que nous avons des notaires, pour y instrumenter comme tels. Mais l'on a dit que l'acte avait été contresigné par le second notaire si longtemps après sa confection que ce qui était toléré par l'usage, pourvu que ce fût fait peu de temps après la confection de l'acte, ne pouvait pas être autorisé après un aussi long temps. Je ne vois aucune raison de faire une différence, pourvu que l'acte soit présenté au second notaire, par le notaire instrumentaire *lui-même*, et que le tout se fasse sans fraude. Dans le cas actuel, l'acte a été signé par les parties aux noms desquelles l'Appelante agit pour en demander la fausseté et la nullité. Ces parties sont restées silencieuses pendant 10 ans, sans jamais se plaindre de ce que ce préambule d'inventaire n'avait pas été contresigné. S'il avait pu être invoqué par elles à leur profit, je ne pense pas que cette prétention eût été élevée par l'Appelante. De part et d'autre, les parties signataires au préambule d'inventaire sont demeurées dans le silence pendant 10 ans, sans jamais penser à en demander la nullité. Il a fallu l'intervention d'un tiers créancier pour venir prendre avantage à l'encontre de l'une d'elles, de ce que *tout au plus* l'on peut appeler un acte d'oubli, ou de négligence du notaire, qui paraît avoir eu alors toute leur confiance, oubli ou négligence si commune et si générale chez tous les notaires, et par tout le pays sans exception. S'il fallait donner gain de cause à l'Appelante sur ce point, ce serait, en quelque sorte, favoriser la mauvaise foi d'une partie qui *viendrait* retirer un avantage indu de l'oubli du notaire instrumentaire, à l'encontre d'un acte qui porte sa signature. Les Intimés ont dormi tranquilles pendant 10 ans, avec une copie authentique de l'inventaire par devers eux. Ils savaient que la minute était signée par M. et Mdme Grothé, et par les deux estimateurs et M. Brault, comment pouvait-il leur venir à l'idée de voir si cette minute avait été contresignée le jour même ou le jour suivant. Ce n'était pas à strictement parler leur affaire, mais celle du notaire instrumentaire. Elles s'en étaient rapportées comme toute partie contractante au notaire de la famille, au notaire instrumentaire. Il était toujours temps pour ce dernier, de compléter sa minute en la présentant au contre-seing. C'est ce qu'il a fait aussitôt que son oubli, son acte de négligence, lui a été révélé. Est-ce que nous allons maintenant déclarer faux un acte, qu'il était du

(1) Duranton, vol. 13, n° 33.

devoir de Brault, notaire instrumentaire, de faire contresigner aussitôt qu'on appelait son attention à le compléter, et à ce qu'il aurait dû faire longtemps auparavant. Il faisait là un acte commendable, et je ne vois pas comment on pourrait en faire un reproche aux Intimés, avec la preuve que nous avons en cette cause. Il n'y a dans tout cela rien de faux, rien qui répugne à la bonne foi. Il peut y avoir eu nullité, mais certainement qu'il n'y a pas eu faux, dans l'acceptation propre du mot. Et ce ne serait qu'un faux relatif, mais bien inoffensif: Poulain-Duparc, que *Toullier appelle notre maître*, définit ainsi le faux, 12, v., p., 625, n° 1: "En général, le crime "de faux est l'acte *nuisible* par lequel on fabrique une pièce "contraire à la vérité, ou on altère une pièce véritable." No. 2: "*C'est un acte nuisible;* et conséquemment il n'y a "point de vrai caractère de faux, lorsque l'acte n'est pas "nuisible. C'est la maxime *nullum falsum nisi nocivum.* Il "n'y a en ces cas qu'un faux matériel, qui ne fait naître aucune "action civile ou criminelle." No. 5: "Mais il faut observer "qu'un acte peut être contraire à la vérité, sans être *faux* "dans sa substance, et conséquemment *sans pouvoir* être "attaqué par la voie de *faux principal* ou *faux incident.*" Avant de terminer, je pense devoir revenir sur ce qui paraît être le plus grand moyen d'appel, c'est-à-dire, la protestation du 16 mars, 1858, par Sancer, au notaire Houlé. Dans cette notification, M. Sancer, se contente de dire "qu'il entendait "opposer des moyens de nullité à l'inventaire" et il ajoute "qu'il a raison de croire qu'il ne lie aucunement la dite Dame "Grothé, *si même il a été signé par elle, ce qui reste à cons-* "*tater.*" Ainsi, en prenant les termes mêmes dont Sancer s'est servi pour empêcher Houlé de contresigner, il est évident qu'il n'élevait qu'une question de nullité qui pouvait être décidée sans qu'il y eût un faux, et qu'il n'osait pas assumer que les signatures étaient fausses, ou qu'il eût aucunement à se plaindre d'un faux. Il n'en fallait pas plus probablement pour engager Houlé à passer outre en présence d'une protestation aussi faiblement exprimée. Il ne voyait, sans doute rien que d'ordinaire, suivant l'usage établi, et il avait son confrère pour garant de la vérité des signatures et de l'acte, en présence des doutes faiblement et vaguement exprimés non pas par une partie à l'acte, mais par le cessionnaire d'un créancier de cette partie, ce qui pouvait être, et devait être, pour le second notaire, une autre raison de ne pas refuser son contreseing. N'oublions pas qu'en point de fait il n'a nullement été prouvé que Mde Grothé n'avait pas signé le préambule, tout au contraire, il paraît par la preuve que sa signature et celle de son mari, sont vraies. Quand au moyen tiré de ce que l'estimateur, Dorval, était décédé lorsque l'acte

a été contresigné, c'est un fait sans grande importance. L'estimateur pouvait bien être un témoin, quant à l'évaluation des choses inventoriées, mais il n'était nullement un témoin nécessaire au préambule d'inventaire quant aux admissions et concessions que les héritiers et légataires voulaient ou pouvaient se faire mutuellement. Le préambule d'inventaire pouvait être bon, sans la présence des estimateurs. Et aucun des deux n'avait intérêt à élever des difficultés à cet égard, et ils étaient sans intérêt au contreseing de l'acte. Je crois avoir suffisamment fait voir que la question reste la même, nonobstant la protestation de Sancer, pas plus formelle qu'elle n'a été faite, et venant d'un tiers, et non d'une partie à l'acte même. Revenant maintenant à la question principale, l'on dit qu'une loi ne tombe pas en désuétude par faute de son exécution. Mais l'on ne peut nier que D'Aguesseau, Toullier, Duranton et autres s'accordent à dire formellement qu'il y a telle chose qu'une ordonnance ou une loi abrogée par un usage contraire, continuel, uniforme et immémorial. Si cela est vrai, combien de siècles faudrait-il donc pour justifier cette doctrine. Car, dans notre cas, il y a près de quatre siècles qu'un usage existe au contraire de ce que l'ordonnance prescrit. Est-ce que ce n'est pas plus que suffisant pour donner lieu à l'application de la doctrine enseignée par D'Aguesseau, Toullier et Duranton. Ou, faudrait-il remonter jusqu'au déluge, pour dire qu'une loi est abrogée par désuétude ? Quel est le juge, l'avocat, le notaire ou la partie contractante à quelqu'acte notarié que ce soit, qui ait jamais cru devoir prendre la précaution de voir à ce que l'acte notarié auquel il était intéressé comme partie ou comme conseil, fut exécuté et signé en la présence de deux notaires. N'est-ce pas là une preuve évidente et complète que la présence du second notaire n'a jamais été observée à la rigueur : certainement qu'il faut répondre oui. Du consentement unanime de tous, on s'est toujours contenté du contre-seing du second notaire, après coup, et la signature du second notaire n'était regardée comme nécessaire qu'en tant qu'elle attestait la signature du notaire instrumentaire. Je dirai de plus qu'il a été un temps dans ce pays, et ce jusqu'à il y a 40 ou 50 ans, où il y aurait eu impossibilité pour un notaire instrumentaire de faire contre-signer sa minute avant plusieurs jours. Je veux parler du temps où il n'y avait que peu de notaires, et qu'ils demeuraient à des distances considérables, et ne se rencontraient que rarement. Cette difficulté existe encore dans certaines localités éloignées. Est-ce que nous irions frapper tous ces actes de faux ou de nullité pour avoir été contre-signés le lendemain, huit jours ou un mois après. Il suffit de présenter le trouble et le cahos qui s'en suivraient, pour faire voir que nous ne pouvons pas par notre jugement accueillir

les propositions de l'Appelante, qui dans le fond est sans grief réel et véritable, soit à titre de faux ou de nullité. Le seul remède (s'il faut en avoir un pour réprimer la violation d'une loi tombée en désuétude, et rétablir et exiger le contre-seing comme chose nécessaire, tandis qu'il n'a été toujours et jusqu'à présent qu'une pure formalité) serait l'intervention du pouvoir législatif, et la passation d'une loi qui frapperait de punition personnelle ou d'amende, tout notaire qui exécuterait ou contre-signerait aucune minute hors la présence des parties ou de son confrère. Peut-être qu'une loi qui irait aussi loin, aurait l'effet d'arrêter ce que l'on croit être un abus sérieux ou dommageable, mais jusqu'à ce qu'il y ait pareille loi, nous n'avons pas les moyens d'y suppléer en présence d'un état de choses que nous ne pouvons méconnaître. Je puis ajouter que l'intervention législative paraît être considérée nécessaire par les codificateurs, et a été même suggérée par quelques articles du code projeté, dans des termes plus énergiques que ceux des ordonnances de 1498 et de 1579, et de la loi du 25 ventôse an XI, mais qui ne le sont peut-être pas encore assez pour atteindre les notaires réfractaires, c'est pourtant à quoi il faudrait en venir pour réprimer l'abus ; à moins que l'on ne fasse comme en France, par la loi du 21 de juin 1843, par laquelle il est statué comme suit : " Les actes nota-" riés passés depuis la promulgation de la loi du 25 ventôse " an XI, ne peuvent être annulés par le motif que le notaire " en second, ou les deux témoins intrumentaires n'auraient " pas été présents à la réception des dits actes." C'est donc au gouvernement à agir, comme dit Duranton à l'endroit ci-dessus cité, car les citoyens ne sauraient être victimes de l'approbation qu'il a donnée par son silence depuis deux siècles, jusqu'à ce jour. Enfin pour répondre à ce qui a été cité de l'article additionnel de Toullier sur ce sujet, au no. 78, du 8me volume, je dirai que depuis la loi de ventôse en 1803, un grand nombre de jugements des Cours françaises ont jugé qu'elle était tombée en désuétude par le non usage. Entre autre celui de la Cour royale de Rennes, du 24 juin 1824, et celui de la Cour de cassation du 14 juin 1825. Il est vrai que l'on en trouve au contraire, et que l'on cite celui de la Cour de Toulouse, du 28 novembre 1825. Mais un des motifs de ce jugement est dans les termes suivants : " Attendu d'ailleurs que l'usage invoqué " n'a aucun des caractères voulus par les principes du droit " pour abroger la loi ; qu'il doit constituer un long usage, " remontant tout au moins à l'époque fixée pour la prescription " de long cours, *ce qui ne peut avoir lieu à l'égard d'une loi* " *qui n'a que vingt-deux ans d'existence.*" C'était par là même reconnaître, que s'il se fût agi d'une loi plus ancienne, il n'y aurait pas eu lieu de repousser la doctrine, que l'usage

constant et universel au contraire d'une loi, la fait tomber en désuétude, et l'abroge par cela-même, sans que son inobservance puisse être invoquée avec succès. Pour toutes ces raisons et en faisant l'application des autorités ci-dessus citées, et prenant en considération les faits de la cause et la question telle qu'elle se présente, je pense que nous ne pouvons faire autrement que de confirmer le jugement de la Cour Supérieure, du 31 octobre 1860, et ce purement et simplement, et avec dépens de cette Cour.

DUVAL, Justice, stated in effect that he was decidedly of opinion that the judgment must be confirmed. The law of France, which was our law, was settled on the point, and had been so for five hundred years; it had been recognized by all the tribunals of France, and the instrument in question here could not, in a french court, have been declared a *faux*. Ought this court to set aside a jurisprudence of five centuries? If so, they could be bound by no restrictions whatever, they were free as air and above the law itself. He referred to Drion, as recognizing that the old french jurisprudence was that now recognized by the majority of the court; the practice of the second notary countersigning, after the execution of the deed, had become so inveterate, that the courts had been obliged to recognize it. Toullier himself recognized that as a fact, but argued against the decisions of the courts of old France. The late french law of 1843, did not require the presence of the second notary for every kind of *acte*, but only for those of importance, and not to such an *acte* as the one in question here, nor was the case referred to by Toullier an analogous case. It referred to a signification which was made actually by a clerk and certified by the *huissier* as if made by himself. That was clearly an abuse, and Toullier might well be severe against it. So the letter of d'Aguesseau related to witnesses, and not to the second notary. The opinion of Marcadé also recognized the old french jurisprudence. The learned judge, then referred to Bonnier, and to the edits and ordonnances of August 1717 and 1785, also to a case of *McCallum* vs. *Seguin*, decided many years ago at Quebec, in which an instrument passed before Têtu, notary, and countersigned by Lelièvre, as second notary, after the death of at least two of the parties to it, was held good. He would uphold the old jurisprudence, because it was fixed and certain, and it was not for the courts to create remedies which lay only with the legislature.

MEREDITH, Justice: The principles of law applicable to this case have been so fully discussed by my learned brethren, who have already explained their views, that I feel I can add little, if indeed anything, to what has been said by them. The question raised is, however, one of such general importance, that

I deem it my duty to state the reasons by which I am guided in coming to the conclusion that the judgment of the Superior Court, in this cause, ought to be confirmed ; and I shall do so as briefly as possible. In the first place, although doubtless conflicting authorities may be cited on the subject, I am clearly of opinion that, according to the laws of France, as established in this colony, and still in force here a law may be abrogated by a contrary usage. D'Aguesseau, (1) Cochin, (2) Solon, (3) Dupin, (4) Dalloz, (5) Merlin, (6) Toullier, (7) and a host of auther authorities, may be cited in support of this opinion. I do not propose to read these authorities upon the present occasion, because the gentlemen of the Bar are familiar with them. Besides many of the authorities cited have already been referred to by my learned brother, Judge BERTHELOT, and most, if not all of the others, are quoted in the factum of M. Cherrier, and in the judgment of Judge BADGLEY, to be found among the proceedings of the Seigniorial Court. (8) Indeed, until within the last few days, I did not think that this was a point with respect to which there could be any difference of opinion on the Bench in Lower-Canada; but, as my learned brother MONDELET (without I believe expressing any positive opinion as to the doctrine of *désuétude*) has spoken of it as a *Vieille doctrine n'ayant plus de cours, et qui a elle-même tombé en désuétude*, and as I make that doctrine, in a great measure, the basis of my judgment, it is necessary that I should explain the grounds upon which I hold that, according to our system, a law may be abrogated by a contrary usage. It will be recollected that one of the questions submitted to the Seigniorial Courts, was, in effect, whether the *arrêt* of Marly of 1711, and the *arrêt* of 1732, had been abrogated by disuse. One of the propositions submitted in that case on behalf of Sir Edmund Filmer, and others, was, "that, in Lower "Canada, a law may lose its force by disuse, without any "express repeal, or go into *désuétude*, as it is termed." And, on that occasion, it was contended that the said two *arrêts* had fallen into disuse. Chief-Justice BOWEN, Judge AYLWIN,

(1) Lettre du 26 octobre 1736, vol. 9, p. 446.

(2) Œuvres de Cochin, tom. 3, 52e cons. p. 707.

(3) Solon, vol. 1, ch. 6

(4) Dupin, *Manuel des Et. et Notions sur le droit* p. 406.

(5) Dalloz, *Jur.*, tom. 9, vbo *Lois*.

(6) Merlin, *Questions de droit*, 1e ed. vol. 3. 546, 6. 427, 7. 185, 8. 238.

(7) Toullier, 1 vol. n° 162.

(8) Vol. B, p. 59 i.

and Judge BADGLEY gave it as their opinion that those *arrêts* "had fallen into *désuétude*;" but the majority of the Court composed of Chief-Justice LAFONTAINE and Judges DUVAL, CARON, DAY, SMITH, MONDELET, MEREDITH, SHORT and MORIN, held that the *arrêts* then in question had "not fallen into *désuétude.*" (1) But no one of all the Judges above named, in the course of his observations explanatory of the judgment then rendered, expressed even a doubt, so far as I am aware, as to the possibility of a law in Lower-Canada being abrogated by disuse. And, when we bear in mind the vast importance of the questions submitted to that Court; questions which deeply affected the proprietary rights of the whole of the population of Seigniorial Canada; when we also bear in mind the care, the zeal, and the ability with which those questions were argued by the eminent counsel engaged in that memorable discussion; and when, in fine, we recollect that twelve of the Judges of Lower Canada for a period of several months devoted, I may say, their undivided attention to the consideration of the matters so submitted to them; we may I think feel confident that, if the question as to whether in Lower-Canada, a law may be abrogated by disuse, had in their opinion bten susceptible of reasonable doubt, Chief-Justice LAFONTAINE and the Judges who agreed with him in saying that the *arrêt* of Marly (1711), and the *arrêt* of 1732, had "*not fallen into désuétude*" would have given a full explanation of their views as to whether under our system any law can be abrogated by disuse. It has however been contended that the ordinance of 1498, and the ordinance of Blois (1579,) are laws *d'ordre public*, and therefore that their provisions cannot be abrogated by disuse; and it is said that the usage relied on consists of a repeated series of violations of the law, and therefore that it could never be any multiplication of those acts, whatever may be their aggregate number, nor, by any lapse of time, however long, acquire the force of law. I readily admit that a usage cannot acquire the force of law, if it be so unreasonable or so absurd, or so plainly contrary to the interests of society, as to render it impossible to suppose that the regularly constituted authorities of the country could have given it their sanction. I may also admit that the usage in question is, in some respects, objectionable; but still, in my opinion, it cannot be treated as inoperative on the grounds just alluded to; because, not to speak of the numerous judgments by which effect has been given to it, we find that it has been expressly sanctioned by the government of France on several occasions. Bonnier, in his *traité*

(1) Lower-Canada Reports, *Seigniorial Questions*, Vol. A, p. 10.

de la Preuve n° 411, p. 416, gives the words of the ninth art., of the *loi de ventôse* which are as follows: "Les actes seront reçus par deux notaires, ou un notaire assisté de deux témoins," etc., and says that this provision of law is founded on the ordinance of the first December, 1437; and after explaining the grounds upon which the *loi de ventôse* is based. Adds: "Mais il est souvent difficile, dans la pratique, d'obtenir l'as-
" sistance de deux notaires; aussi la prescription de l'ordon-
" nance de 1437 *était-elle tombée en désuétude dans l'ancien*
" *droit*, excepté pour certains actes d'une haute importance,
" tels que les testaments. L'article 14 des statuts et règle-
" ments de la communauté des notaires au Châtelet de Paris,
" homologués par un arrêt du parlement du 13 mai, 1681,
" portait que les notaires seraient obligés de signer l'un pour
" l'autre les actes et contrats non contraires aux ordonnances
" et bonnes mœurs, dont ils seraient requis, sans le pouvoir
" refuser, et cette jurisprudence *avait été convertie en loi par*
" *des édits de* 1691 *et de* 1706." (1) Drion, also in his work *du Notaire en second*, says: "Malheureusement il n'existait
" aucune disposition expresse, quant à la présence du second
" notaire. L'usage avait établi ce mode de passation des actes,
" et la loi avait négligé d'en régler les formes. Il fallut donc
" recourir à l'interprétation, et les parlements eurent à se re-
" procher une condescendance coupable pour les prétentions
" des notaires qui s'obstinèrent à soutenir que l'ordonnance de
" Blois s'appliquaient uniquement aux actes passés devant té-
" moins, et non à ceux reçus par deux d'entre eux. Le gou-
" vernement lui-même crut devoir céder en présence d'une
" interprétation *ainsi sanctionnée par l'autorité des magis-*
" *trats*. Il préféra régulariser un abus plutôt que de le sup-
" primer. C'est dans ce but qu'il revêtit de son approbation
" les statuts des notaires de Paris, arrêté, en 1679, et homolo-
" gués au parlement de Paris, le 13 mai, 1681, on y lit, art. 14,
" que les notaires de cette ville *seront obligés de signer en*
" *second tous* les actes conformes aux lois, lorsqu'ils en seront
" requis par leurs confrères, sans le pouvoir refuser. Un édit
" du mois d'octobre, 1691, enregistré au parlement le 21 no-
" vembre suivant, dispense les notaires de Lyon de prendre à
" l'avenir des témoins pour signer les notes avec eux, à la
" charge de les faire signer en second par un de leurs con-
" frères, *comme les notaires de Paris*. Sans néanmoins rien
" innover à l'usage établi pour les testaments solennels. A
" partir de ce moment *tout était réglé*, les notaires qui rédi-
" geaient seuls les conventions des parties, et qui faisaient
" simplement contresigner leur acte par un collègue, agissaient

(1) Bonnier, de la Preuve, n° 414, p. 416.

" légalement, ils avaient pour eux *les édits du pouvoir souve-* " *rain*, et ne craignaient plus une interprétation contraire à " leurs prétentions." (1) From these authorities we see that the parlement de Paris of 1681, and the King of France, in 1691, and 1706, not only sanctioned, but legalised the usage in question. Nay, they went much farther than the usage now contended for, inasmuch as they rendered it obligatory on the notaries of Paris te countersign deeds executed by their *confrères*, although the notary, so required to countersign, was not present at the execution of such deed. Such being the case, it is plainly out of our power to say that the usage in question is so unreasonable, or absurd, as to make it impossible to suppose that the Legislature could sanction it; for the fact is, that it was expressly sanctioned, not only by the *parlement de Paris*, but by the Royal *Edits* of 1691 and 1706. Moreover, notwithstanding the strongly expressed opinions of Toullier and others, the Legislature of France, by, I believe, the latest law on the subject, that of 1843, have to, a great extent, sanctioned the usage in question; for, although that law requires the presence of the second notary at the execution of wills, and of five other classes of instruments, yet it dispenses with the presence of the second notary at the time of the execution of all other notarial deeds. (2) And here, I may observe that a part of the passage just quoted from Drion is useful as drawing our attention to a point of some importance in this case, and one in relation to which any one may satisfy himself, who will take the trouble of reading the laws in question. That point is, that no one of those laws in express terms says, that a notarial deed shall be null, if the *notaire en second* is not present at the time the parties signed it; nor does any one of them *in express terms* require the two notaries to be present at the time of the execution of the deed by the parties. The words of Mr. Drion are "malheureusement " il n'existait aucune *disposition expresse*, quant à la présence " du second notaire;" and such is the fact. I am not however to be understood as saying there was any room for reasonable doubt as to the meaning of the laws in question, nor as holding that the absence of such express words justified the practice in question, all I desire to do, is to notice the phraseology of those provisions of law, which is of importance in reference to the question as to their abrogation by disuse. It has also been contended that, although a rule of law established by usage or custom may fall into disuse, yet that the contrary

(1) Drion, du Notaire en second, pp. 22, 23.

(2) Bonnier, pp. 417, 18, 19

ought to be held with respect to a law emanating from Royal authority; But such a distinction is not, I think, justified by the authorities. The great Chancellor d'Aguesseau, and, on this subject, a higher authority cannot be cited, says: "Toutes "les lois sont sujettes à tomber en désuétude," and many other writers before the code speak on this subject in equally general terms. The same opinion is also maintained by many eminent writers subsequent to the Code, for instance Dupin says: "Chez nous l'ordonnance de 1619, avait aussi une disposition "expresse dans son article 1er, qui enjoint l'exécution de "toutes les ordonnances qui ne sont spécialement revoquées "*ni abrogées par usage contraire, reçu et approuvé de nos* "*prédécesseurs et de nous;*" and the author adds: "Et à cet "égard il faut remarquer que cette approbation elle-même n'a "besoin que d'être tacite, et qu'elle résulte suffisamment de ce "que l'autorité qui a le pouvoir de faire exécuter la loi s'est "dispensée de tenir la main à cette exécution, et a laissé pra-"tiquer ouvertement le contraire." (1) Solon goes quite as far, at no. 399, he puts the question, "*Quid*, si la loi était prohibitive de "tout usage contraire. Si par exemple le législateur avait décla-"ré que la loi serait observée nonobstant tout usage qui tendrait "à l'abroger." And giving his own opinion on the question thus put, the author says: "Sans doute l'abrogation serait beaucoup "plus difficile à s'opérer; il faudrait beaucoup plus de temps, "et un plus grand nombre d'actes contraires, mais du moment "que ces actes seraient multipliés, qu'ils se renouvelleraient "journellement, avec les caractères ci-dessus, ils abrogeraient "la loi, malgré la défense qui se trouverait comprise dans ses "dispositions." Moreover, it is to be recollected that the *arrêt* of Marly, and the *arrêt* of 1732, were promulgated by Royal authority; and yet it does not appear to have occurred to any one of the twelve judges, composing the Seigniorial Court, that the fact of those laws having been so established by Royal authority, rendered it impossible for them to be abrogated by disuse. It seems to me that those who maintain that, under our system, a law cannot fall into *desuétude*, are led into error (I say it with all deference) by authorities which have no important bearing upon the present case. My attention has been particularly drawn to a passage in the 1st Vol. of Demolombe, No. 130, in which that author, speaking of the time at which he wrote, says in effect, that, in his opinion, in France, a law cannot be abrogated by disuse; but Demolombe adds: "Je ne parle, bien entendu, que d'un pays comme le nôtre, où la puissance législative ne peut être exercée que suivant les conditions déterminées par la loi constitutionnelle," and

(1) Dupin, *Notions sur le Droit*, p. 406.

Marcadé whose views as to the doctrine of *désuétude* seem to agree with those of Demolombe, after laying down the general rule, " au pouvoir législatif seul, évidemment, il appartient de " changer la législation ;" adds : " Donc, tant que l'usage et la " coutume purent faire les lois, ils purent aussi les défaire. " C'est ce qui avait lieu à Rome, et dans notre ancien droit. " La maxime : *leges per desuetudinem abrogantur*, était la " conséquence de cette autre maxime : *Consuetudo pro lege* " *custoditur ; ex non scripto jus venit quod usus comprobavit ;* " mais du moment que l'usage ne peut plus faire la loi, il ne " peut donc plus la détruire." (1) No commentary is necessary to show that the autorities just quoted can aid us but little in determining whether the laws in question in this cause have fallen unto *désuétude ;* for, if those laws have been so abrogated, by disuse, such abrogation must have taken place, not only long before the changes in the laws of France, to which Demolombe and Marcadé refer, but even before the cession of this province by France to England. Assuming then, as I think I may, that, under our system, as a general rule, a law may fall into *désuétude*, and that there is nothing in the provisions of law, with respect to the presence of the *notaire en second* to exclude them from the operation of that general rule of law, I shall now proceed to consider, briefly, whether the usage relied on by the Respondents is of a nature to cause the abrogation of those provisions of law. Toullier says : " Pour établir un usage, cinq choses sont nécessaires, il faut " qu'il soit uniforme, public, multiplié, observé par la généralité " des habitants, réitéré par un long espace de temps."(2) Toullier, in the same number, adds : " C'est aux juges de décider, " par le nombre et qualité des actes si l'usage est établi, si la " coutume est acquise, si elle est prouvée, s'il s'est écoulé un " temps assez long pour que le public et le législateur en aient " eu connaissance." And as to this point Solon says : " Nos lois " ne disent rien sur le genre de preuves que les tribunaux " doivent admettre pour la désuétude, et par cela même, " ceux-ci n'ont nullement besoin de recourir aux moyens " exigés par l'ancienne jurisprudence ; l'existence de quelques " arrêts, l'opinion des auteurs, peuvent déterminer l'opinion " des Juges, pourvu que ces arrêts et ces opinions soient " conformes." (3) Now it is beyond doubt that the usage in question commenced at a period earlier than the ordinance of 1498 ; and it appears from the writings of Drion

(1) Marcadé, 1 Vol., p. 32.

(2) Vol. 1 No. 159 : Vide also, Solon, *Théorie de la nullité*, vol. 1, Nos. 395 to 399.

(3) Solon, No 401, p. 271,

and others, that, even after the passing of the ordinance of Blois, (1579) the notarial profession in France constantly contended that the provisions of law now under consideration, related to deeds passed before a notary and two witnesses, and not to deeds passed before two notaries in the usual form. Drion, it will be recollected, says that, in consequence of there being no express provision in any of the ordinances as to this point, " il a fallu recourir à l'interprétation, et les parlements " eurent à se reprocher une condescendance coupable pour les " prétentions des notaires." The author adds that the government yielded to the interpretation thus put by the Courts upon the ordinances, and that, in consequence, by the *arrêt* of the *parlement de Paris* of 1681, and by the Royal Edict of 1691, the usage in question was sanctioned and regulated to the extent and in the manner already mentioned. It may be observed that the *arrêt* of the *parlement de Paris* requiring notaries in Paris to countersign deeds executed by their *confrères* was passed eighteen years after the Edict of Louis the fourteenth, establishing the *Conseil Supérieur* in Canada, and requiring that Court to observe the Laws and ordinances of France, and to proceed as nearly as possible according to the practice of the *parlement de Paris*, " et y procéder autant qu'il " se pourra en la forme et manière qui se pratique et se garde " dans le ressort de notre Cour de parlement de Paris;" and that the Edict of Louis the 14th of 1691, also sanctioning the same usage, was passed at a period when a very considerable part of Seigniorial Canada was being conceded to settlers from France. From the *arrêts* of the *parlement de Paris* of 1681, and of the Edict of 1691, and the authorities referred to by my brother Berthelot, it is I think beyond doubt that the usage in question was in full force in the *parlement de Paris* in 1663, when the laws of France and the practice of the *parlement de Paris* were established in Canada; and therefore it is not surprising that that usage should have been introduced into the colony as part of the laws of France, observed in the *parlement de Paris*. There was, it is obvious, much more cause for the continuance of the usage in the colony, than there was for its establishment in the mother country; and it is I believe beyond doubt, that from the first settlement of the colony until now, the uniform usage, throughout every part of the country, has been for one notary to be present at the execution of notarial deeds, which are afterwards countersigned by the second notary. I have had the advantage of conversing on this subject, with the venerable Chief-Justice of the Superior Court of Lower-Canada, who has been a judge of the highest Court of original Jurisdiction for the District of Quebec, for more than fifty years, and who, before his ap-

pointment to the Bench, held the office of attorney general; and I am permitted by him to say, he considers it incontrovertible, that the usage in Lower-Canada, as to the execution of notarial deeds is, and has been, such as I have stated. Speaking from my own experience which now extends over a period of thirty years, I cannot say that I have ever seen a deed executed in the presence of two notaries; and although I have spoken to several members of the Bench, and among others, to the two learned Judges from whom I have the misfortune to differ upon the present occasion, and also to many other persons from different parts of the province, I have not yet met one person who could say he had ever seen two notaries, *as such*, present at the execution of any notarial instrument, other than a will. It is, as has been justly said by a learned Judge, for whose opinions I have the highest respect, (1) a matter of extreme delicacy for a Court to declare it will not execute a law, because, in its opinion, it has fallen into *désuétude*, and I quite agree with that learned Judge in thinking that the position should never be taken without great caution and careful examination, and only in cases admitting of no reasonable doubts. But, after giving to the present case all the consideration in my power, I am satisfied that the usage to which I have referred is of such a nature as to make it our duty to say that the provisions of law relied on by Appellant have long since fallen into *désuétude*; and, if it be plain that Judges cannot hesitate to give full effect to laws in force, and this irrespective of consequences, it is equally plain that it is beyond the power of Judges to revive laws which have ceased to exist. I shall content myself with this explanation of my views upon what I regard as the principal question in this case. There are, it is true, particular circumstances connected with it, well deserving of consideration, but they have been so fully treated by the learned Judges with whom I concur in the present judgment, that it is sufficient for me to say that I agree in their views. At the same time, however, that I concur with Judge Duval and Judge Berthelot, in confirming the judgment of the Superior Court, I also quite agree with them and the other members of the Court, in saying that the subject is one which calls for Legislation; but such Legislation, whatever may be the rules to be laid down for the future, should be so framed as not to impair, or even to cast a doubt upon, pre-existing deeds. In this respect I think we may well follow the example of the french law of 1843, which, at the same time that it established clear and stringent

(1) Opinion of M. Justice Day, Seigniorial Rep., vol. B., p. 37.

rules for the future, removed all doubt as to the validity of notarial deeds previously executed

Judgment: "The Court, considering that there is no error in the judgment appealed from, rendered by the Superior Court for Lower Canada, sitting at Montreal, on the 31st of October, 1860; doth affirm the same." (13 *D. T. B. C.*, p. 179.)

BARNARD, E., for Appellant.

DORION, DORION and SENECAL, for Respondent.

ACTION ENTRE LOCATEUR ET LOCATAIRE.—COMPETENCE.

SUPERIOR COURT, Quebec, 29 avril 1863.

Before: TASCHEREAU, Justice.

KELLY, *vs.* SHRAPNELL.

Jugé: Qu'en vertu des dispositions du Statut amendant l'acte des locateurs et locataires, le montant du loyer réclamé indique la Cour qui a juridiction quant à l'action.

2o. Que dans une action pour éviction portée, en raison de ce que les loyers d'une maison ne sont pas payés, en vertu de l'acte des locateurs et locataires et du Statut qui amende cet acte, la Cour n'a aucune juridiction, et ne peut prendre en considération un montant dû pour le louage de meubles, quoique loués par le Demandeur au Défendeur par le même bail que la maison. (1)

The declaration set forth the lease of a cottage at Spencer Wood, dated the 2nd May, 1862, executed before Austin, and another notaries, for the term of three years from the 1st May of that year. This lease was made by Plaintiff to Defendant, at an annual rent of £95 0 0, being, as expressed in the lease, and on the face of the declaration, at the rate of £55 0 0, for the cottage, and £40 0 0, for the furniture of Plaintiff, then in the possession of the lessee, under a prior lease of the 6th February, 1862, which sum (£95) Defendant agreed to pay in quarterly payments of £23 15 0, each. The Plaintiff also alleged that the Defendant had paid nothing, and that there was actually due the sum of £71 5 0, for the three quarters rent accrued on the 1st February last (1863). The Plaintiff concluded with the usual prayer, that the Defendant be ordered to pay, and in default of his doing so, that he be ejected from the premises. Defendant put in a declinatory exception, containing, among other grounds, the following: Because the action is instituted under the act respecting lessors and lessees, and under the statute amending it; the provisions of which statutes apply exclusively to leases of real estate, and not to the hiring of moveables. And because the declaration in subs-

(1) V. art. 1624 C. C., et 887, 1105 et 1106 C. P. C.

tance alleges that the lease of the cottage in question was made at an annual rent of £55 0 0, only. And because the declaration also alleges that Defendant is indebted to Plaintiff in only three quarters rent of the cottage, which, at the rate of £55 0 0, per annum, would make but £41 5 0 currency, which sum falls exclusively within the jurisdiction of the Circuit Court, and is insufficient in amount to vest jurisdiction in the Superior Court, in which this suit is brought and that, therefore, the court now here, cannot take cognizance of this present action. The Defendant also filed a demurrer upon the above grounds, and also added, in the latter plea, that the claim for the rent of the moveables could not be united *in* the action of ejectment. The Defendant argued that the amount of the three quarters rent of the cottage, should alone determine the jurisdiction of the court, before which this action should be brought, and that the claim for the rent of the moveables could not be joined with it. The Plaintiff, in answer, relied upon the text of the 1st sec. of the 25, Vict., chap. 12, which is in the following terms " actions under this act, shall be instituted in the Superior *or* Circuit Court, for the amount of rent or damages sued for, and the costs shall be allowed and taxed in accordance with the amount for which judgment shall be rendered " and also contended that Plaintiff had, under the terms of the above section of the statute, the right to institute his suit, *either in* the Superior *or* Circuit Court, at his option.

JUDGMENT: The court, considering that actions instituted in virtue of the act concerning lessors and lessees ought to be brought either before the Superior *or* Circuit Court, according to the amount of rent or damages claimed: Considering, that upon the face of the declaration, it appears that Plaintiff's right of action for the rent of the cottage therein mentioned is but £41 5 0: Considering that Plaintiff had no right, under the said act, to join in his action for the rent of the cottage the sum also claimed for the rent of the furniture, so as to swell the amount demanded to that required to give jurisdiction to this court: Considering that, in all respects, that part of the *défense en droit*, relative to the rent of the furniture, ought to be maintained, maintains the declinatory exception, and dismisses Plaintiff's action, including those of the *défense en droit* and the other pleas to the merits as a consequence of the dimissal of the action by the said declinatory exception. (13 *D. T. B. C.*, p. 214.)

PARKIN and PENTLAND. for Plaintiff.

AUSTIN, F. W. G., for Defendant.

INTERPRETATION D'UN CONTRAT.

QUEEN'S BENCH, APPEAL SIDE, Montréal 9 mars, 1864.

Before : DUVAL, Chief Justice, MEREDITH, MONDELET, and BADGLEY, Justices.

DAVIES, Appellant, *and* CUSHING, Respondent.

Jugé. 1° Que, lorsque, dans un contrat de vente de certains lots de terres, en considération d'une somme payée, et "en outre, du paiement ci-après et à toujours, au vendeur, de la dixième partie des profits nets, après déduction des pertes et charges résultant de tous travaux de mines, que l'acquéreur fera sur tous les lots, lesquels profits seront constatés le 31 décembre de chaque année, et desquels il sera rendu compte et iceux payés dans les six mois ensuivants:" tels profits sont payables, non seulement sur les travaux de mines faits par l'acquéreur individuellement, mais encore sur tous travaux de mines faits par lui, conjointement avec d'autres, et dans lesquels il devait être, ou était intéressé.

2° Qu'un compte rendu allouant seulement au Demandeur, comme représentant le vendeur, un dixième des profits réalisés sur les mines par le Défendeur individuellement, sans égard au montant réalisé ou retenu par un locataire ou une personne faisant les travaux des mines. est contraire au sens de la clause ci-dessus citée, et il sera ordonné une nouvelle reddition de compte.

Le jugement de la Cour Supérieure, MONK, J., a été rendu à Montréal, le 18 février, 1863. Ci-suivent les remarques du juge et le jugement:

MONK, Justice, held, that the case would turn upon the construction to be given to the clause of the deed to Defendant, whereby he undertook to pay and account for the "one "tenth part of all the net profits to result after deduction of "loss and charges from all such mining operations as he "shall carry on upon the said lot." Did this mean that Cushing should get one tenth of the *third* part paid by Sleeper to Davies, which would be equal to one thirtieth of the proceeds? Or was he entitled to one tenth part of the whole product of the mine after deduction of losses and charges? The authorities cited by the counsel did not throw much light on the point, and there was perhaps some ambiguity in the clause. But, the construction given to it by Defendant he held not to be the correct and legal construction. If it were so, then Defendant might lease the mine or work it conjointly with Sleeper, and reduce the share of Plaintiff to any extent he pleased by lowering the rent or increasing the proportion of profit to be retained by Sleeper. He could not hold this to be the meaning of the deed, and he would, therefore, order an account to be rendered on the basis of Plaintiff receiving one tenth of the net profits of all the operations carried on at the mine. This construction was to some extent borne out by

certain notarial deeds filed of record. One of these was a deed from Defendant to Gardner, and other trustees, passed on the 7th October, last, and a deed dated the 28th of the same month, from Gardner, and others, to "The South Eastern Mining Company of Canada," to which latter deed Cushing and Davies were both parties.

JUDGMENT: Considering that Defendant hath not proved etc., Considering, especially, that, in and by the deed of sale of the twenty first day of July, Defendant undertook and promised, bound and obliged himself to the payment, forever thereafter, by him to be made to Anna Maria Wilson, the vendor therein mentioned, and in whose rights Plaintiff now is, of the one tenth part of all the net profits to result, after deducting losses and charges, from all such mining operations as he should carry on upon the lots of land thereby sold, the same to be ascertained to the thirty first day of December yearly, and to be duly accounted for and paid over within the six months next following: Considering that the share, portion or percentage of one tenth part of all net profits, as stated in the deed of sale, was and is payable, not only on mining operations carried on by Defendant, individually, and alone, but also on all mining operations carried on by him in conjunction or in participation with others, in and upon the two lots of land, and on all mining operations in which Defendant was, or was to be, interested. Seeing that the mining operations carried on by Defendant, in conjunction and in participation with Lewis Sleeper, mentioned in the pleadings, under and by virtue of the agreement between Defendant and Sleeper, dated the second day of September, 1859, were carried on in and upon the two lots of land for the joint interest and benefit of Defendant and Sleeper: And considering that Defendant, under and by virtue of the deed of sale of the twenty first day of July, 1859, was and is bound to account to Plaintiff, as representing Anna Maria Wilson, for all the net profits resulting, after expenses and charges, from all such mining operations carried on by him, individually, and by him and Sleeper, in conjunction and participation, under and by virtue of the agreement dated the second day of September, 1859. Considering that Defendant hath not accounted for the whole of the net profits resulting from such joint mining operations, contending that, by law, and his deed of purchase of the two lots of land, he was and is bound and obliged to account for the net profits accruing to him, individually, only: Considering that, in the agreement between Defendant and Sleeper dated the second day of September, 1859, in regard to their projected joint mining operations, in and upon the two lots of

land, a clause of the following tenor and effect occurs, viz: " Such percentage of profits as may accrue to Mrs. Cushing " (to wit, to Maria Wilson) under the deed of sale of the pro- " perty to W. H. A. Davies, to wit, Defendant, shall be borne " by the parties rateably according to their shares of such " ores:" Considering that, by such clause, provision was made for the payment of said percentage, rateably upon their respective shares of the ores to be extracted by such mining operations in and upon the two lots of land: Considering that, by the said deed of sale, of the twenty-first day of July, 1859, from Anna Maria Wilson, to Defendant, a Royalty, equivalent and amounting to a percentage of one tenth part, or ten per cent, upon all the net profits, deducting losses and charges, upon all mining operations to be forever made in and upon the two lots of land, was stipulated and established forever in favor of Anna Maria Wilson, and in favor of her heirs and assigns: Considering, *d'abondant*, that any doubt or ambiguity in regard to the extent and duration of such Royalty, or right of percentage, hath been removed by Defendant himself, in and by a deed of sale by him to George Gardner and Charles Merriam, dated the seventh day of October, 1862, an authentic copy whereof has been produced by Defendant, and wherein the following clause and stipulation occurs, that is to say: " The said W. H. A. Davies, (to wit, " Defendant) did thereby sell said two lots of land with war- " ranty against all gifts, dowers, mortgages, substitutions, " alienations and other hindrances whatsoever, other than " the Royalty and other obligations assumed by said vendor, " (to wit, Defendant) in his deed of acquisition therein after " mentioned, towards Anna Maria Wilson, her heirs and " assigns." Considering further, and *d'abondant*, that any doubt or ambiguity in the said deed of sale to Defendant, of the twenty-first day of July, 1859, were finally and forever removed in and by a certain deed of sale from John Gardner and Charles Merriam, to the " South Eastern mining Company of Canada," dated the twenty-eighth day of October, 1862, an authentic copy whereof hath been produced by Defendant, and to which Plaintiff and Defendant were parties present, and therein and thereby stipulated and agreed to and with the South Eastern mining Company of Canada, as follows, that is to say: " That the Company shall re- " ceive the conveyance, and the lands and premises hereby " conveved to the Company, subject to and charged with all " and every the rights, clauses and conditions mentioned and " set forth in and by the deed of sale thereof, to William " Henry Allan Davies, from Anna Maria Wilson, passed be- " fore Gibb, and colleague, notaries public, on the twenty-

" first day of July, 1859, and subject to and charged with the " payment from and after the first day of October instant, of " the percentage or royalty, of one tenth of the net profits, as " set forth in said deeed, so long as the mines shall he worked, " and bind itself to Job Alexander Cushing, for and with the " payment of said percentage and the performance of all and " every the clauses binding upon William Henry Allan Davies, " under his said deed of purcha-e, to which the company assents. " And Job Alexander Cushing, for divers good and valid con- " siderations to him paid to his satisfaction, hereby intervenes " and becomes a party to these presents, and hereby agrees " and declares that he receives and accepts the company as " bound to him, in place of William Henry Allan Davies, and " hereby substitutes the company, party present and accepting " of substitution in place of William Henry Allan Davies, for " all and every the clauses and conditions of said deed, and " for all future liabilities and payments to arise and become " due after the first day of October instant, all of which said " several liabilities and obligations, so by the said deed under- " taken by William Henry Allan Davies, towards Anna Maria " Wilson, the company hereby undertakes and promises to " fulfil towards Job Alexander Cushing, and to pay all and " every the sums of money, as fully as William Henry Allan " Davis is bound to pay the same, and on the same contin- " gencies; he Cushing, being in the place of Anna Maria " Wilson, under a deed of donation from her to him, passed at " Acton, before Mignault and his colleague, notaries public, the " twenty-fifth day of July, 1860." Considering that it results from the evidence adduced and in adopting Defendant's own and deliberate interpretation of said clause in the deed of sale of the twenty-first day of July, 1859, that these pretensions, as set forth in the pleas by him produced are unfounded in law: Doth overrule and dismiss the plea firstly pleaded by Defendant, on the twenty-second day of October, 1861, and also in the additional plea produced and filed on the seventeenth day of December, 1862, and, proceeding to adjudicate upon the merits of Plaintiff's *demande:* Considering that Plaintiff hath established, by legal and sufficient evidence, the material allegations of his declaration: Considering that Defendant hath not accounted to Plaintiff in the manner and form, and to the extent as he was bound by the deed of the twenty-first day of July, 1859, and by law, to account to Plaintiff. And considering further that Plaintiff hath sufficiently and legally established that the *débats de compte* by him made and filed, in answer to and in contestation of the account produced by Defendant, are well founded, the court doth maintain the *débats de compte,* and doth adjudge and declare that Defen-

dant was and is bound to make and render a true, just and faithful account of all the net profits resulting, after deduction of losses and charges, from all such mining operations as he and Sleeper did carry on in and upon the two lots of land, under their agreement of the second day of September, 1859, up to the thirty-first day of December, 1859; and doth condemn Defendant, within two months after the signification upon him of the present judgment, to make and render to Plaintiff, a just, true and faithful account upon oath of all the ores and minerals obtaiued from the lots of land, and of the prices realized therefor, and of all costs, expenses, losses and disbursements connected with the operations so carried on by him individually, and by him and Sleeper conjointly, from the twenty-first day of July, 1859, to the thirty first day of the month of December, 1859, inclusively, and to furnish all vouchers, receipts and papers connected therewith, shewing the net profits and proceeds of the mines, and the ores and minerals extracted therefrom, during the period last aforesaid, and to pay over to Plaintiff, one tenth part of the net profits and proceeds of the mines, and of the ores and minerals extracted therefrom, deduction being first made of all reasonable losses, costs, charges and expenditures; and, in default of Defendants so making and rendering such true, just and faithful account, in the manner and form aforesaid, and within the delay aforesaid, the court doth adjuge and condemn Defendant to pay and satisfy to Plaintiff the sum of ten thousand dollars, currency, as and for his tenth part or portion of such profits and proceeds, and with interest thereon, from the ninth day of September, 1861, till paid.

BADGLEY, Justice: By deed of sale of 21st July, 1859, Mrs Cushing, the vendor, states herself to be the owner of two lots of land in Acton, "in and upon which there are understood "to exist valuable copper and other minerals, ores; the situa-"tion, extent and value whereof are not sufficiently known," and Defendant, the purchaser states "he proposes to make "further explorations for the said ores, and if they shall be "found valuable enough, that he will then carry on extensive "mining operations in and upon the said lots." The nature of the transaction is thus exhibited, Mrs Cushing had the land with possible metalliferous deposits, which she did not work herself, and was unwilling to expend money in exploring; and Davies, having the capital, was willing to prospect, and explore the lots, for the purpose of ascertaining the situation extent and value of these deposits: She therefore sells to him the two lots for $1400 in cash, and with "the condition of the "further payment, forever, thereafter to be made to her of one "tenth part of all net profits to result, after deduction of losses

" and expenses, from all such mining operations as the pur-
" chaser should carry on in and upon the said lots of land, to
" be ascertained to the 31st of December, yearly, and to be
" duly accounted for and paid over within six months next
" following." Independently of the sale itself of the lots of land there are manifestly two objects contemplated by the deed, firstly, the continued further explorations upon the lots for the discovery of the sufficient extent and value of the deposits, with the view to ascertain its workable quality as a commercial speculation, and, seondly, the consideration reserved by Mrs Cushing, of the one tenth part of the net profits of the mining operations themselves, if, by the effect of the explorations, the sufficiency of the extent and value of the deposits should be established to justify mining operations as a commercial operation. The two objects, namely, the explorations and the mining operations are therefore *in se* manifestly different, the consideration of the former was finally settled and concluded at once, *une fois payé* by the $1400, that of the other was prospective, only to commence if mining operations were carried on, that is as stated in the deed, *bona fide* carried on. Under the former, Defendant explored for mines as an adventurer, at his own risk, under the latter, he carried on mining operations as a mine proprietor and worker, with positive rights and substantial interest in himself, but whereof a portion was reserved for Mrs Cushing. It is not necessary, in this connection, to consider the legal nature and character of this reservation of the one tenth part of the net profits of the mining operations, as the constituent of a partnership between Defendant and Mrs Cushing, because the contention does not arise between them upon that point, but, if it were indeed a partnership, it is clear that Defendant could not, by his own act, or by his introduction of new partners, diminish or prejudice her original share, and the portion reserved by her out of the net profits of the operations, and, therefore, any such arrangement or act by Defendant, could only attach upon his own share. On the 2nd of September, 1859, Defendant and one Sleeper contracted together as follows; Sleeper undertook, at his own costs and expense, to commence forthwith mining operations upon the lots of land, and to carry them on for three years, from the said date; all the ore to result therefron to be divided between them at the mine, towit, " one half to each, until the half should amount to $1400
" in value, and afterwards two thirds to Sleeper, and one third
" to Defendant, to wit, of the ore at the mine;" but Sleeper might terminate the agreement sooner, upon giving to Defendant six months notice. At the close of the agreement, all the plant on the ground, &c., should remain to Defendant, but

Sleeper was to dress on the ground all the ore that remained: The one third share appropriated to Defendant was to be free and clear of cost and expense, the whole of which was assumed by Sleeper, in consideration of and to be borne by him out of his two thirds share. Finally, that such percentage "of profit as might accrue to Mrs Cushing, under "the said deed of 21st July, 1859, should be borne by De-"fendant, and Sleeper, according to their shares of the ores." This agreement has reference to mining operations *per sv*, the proper working of the mine, and not to explorations, and it may be assumed, therefore, that the preliminary explorations of Defendant had been satisfactory, and that the extensive operations contemplated by the deed, were to be actually commenced. It should be mentioned that, at a short time subsequent to the date of this agreement, between Defendant and Sleeper, it was modified to the extent that the ore extracted was to be rendered fit for market, and to be there realised by Sleeper. Now, taking the case of Defendant as the sole worker of the mine, in so far as Mrs. Cushing is concerned, her right to her one tenth share of the net profits began to take effect, under the terms of her deed, from the commencement of his mining operations, and his extraction of the metalliferous deposits; she knew no other contractor with herself but him, nor of any other produce from which her share of profits was to be divided, than the gross proceeds of the ores extracted from the lots sold by her; less the costs and expenses required for extracting the ores, preparing them for market, and realizing them there when so prepared. Her right was a material right influenced by and subjected to the yield of the ores. It is notorious that mines of this description require an adequate system of expenditure, and hence, in the agreement contained in the deed between Mrs. Cushing and Defendant, as he was to incur that expenditure, the division of net profits, after losses and expenditure, was equitably adopted by them instead of the gross extracted ore. In metalliferous mines in England, the rents or reservations are almost invariably proportioned to the quantity of ores actually raised, and without a stipulated certain rent in money. This is called *duty ore*, or the *lot ore* or the *lord's dues*. In the case of Mrs. Cushing, the reserve stipulation took the shape of a portion of the realized net profits, that is the amount of the gross sales, less the expenses and losses incurred in the extraction and sale, and this was all to which she was entitled; she had no other right or control in the matter. As before explained, this was Defendant's contract with her. Did he or could he change it, by his agreement with Sleeper, without her assent? Certainly not, and it has been shewn that neither she nor her assignee ever

recognized or became a party to the agreement between Defendant and Sleeper. Now the nature of the agreement with Sleeper shews that it did not, in any way, interfere with Mrs. Cushing's tenth of the said net profits. But was that agreement a charge or loss, such as was contemplated by the deed? The agreement is that Sleeper should work the mine at his own cost for the profit of Defendant and himself, and should make a division between them of the amout realized in the manner and according to the proportions specified; plainly an agreement to carry on the extensive mining operations contemplated by the deed, on joint account, for the time limited by the agreement. It was this mining operation, and the net profits resulting from the realization of the ore raised, upon which the one tenth of net profits was reserved, and that it was so, and was so understood by both Sleeper and Defendant, is made quite clear from the special stipulations in their agreement respecting that reservation, namely, that " such percentage of " profit, that may accrue to Mrs. Cushing under her deed, shall " be borne by the parties, Defendant and Sleeper, rateably " according to their shares of such ores," or as afterwards agreed between them " according to their shares of the net " amount realized from them." By the agreement, the one third share of Defendant of the prepared ore was to be his without cost, expense or deduction, whilst the two thirds share of Sleeper was to bear all the cost and expenses of extraction, preparation and sale, in which addition was to be charged the two thirds of Mrs. Cushing's percentage, whilst Defendant was chargeable with the remaining one third upon his clear third part or share. Hence the covenant in the deed of sale from Mrs. Cushing to Defendant, reserving to her the one tenth of the net profits aforesaid, has been substantially recognized by both Defendant and Sleeper in the terms of their agreement. The plain and simple deduction from all this is, that her assignee, Respondent, Plaintiff in the Court below, has a right to demand and have a just and true account made up of the net profits realized from all the ores extracted and raised from the mines in question. The account should exhibit this gross extract as well as the losses and charges, in other words the expenses of working the mines and realizing the proceeds. From this, the net profits will be exhibited, and Mrs. Cushing's one tenth established: " le produit net sera établi d'après les " livres ou comptes d'exploitation, constatant les produits ex- " traits, défalcation faite de tous les frais d'extraction et de " réalization des dits produits." In the case before us, Defendant, in answer to the demand for a just and true account of the net profits from the working of the mines, has produced an account which has been *débattu* by Defendant, as being

only a partial account. Upon the merits submitted, that account is limited to Defendant's third share under his agreement with Sleeper, and does not shew the gross produce of the mine nor the amount of the net profits of that produce. The account produced is not sufficient therefore, and the judgment of the Superior Court, is therefore quite correct in requiring Defendant to produce the proper account required under the terms of the deed of sale between Mrs. Cushing and himself, for the net profits of the gross produce of the ores extracted, instead of the partial account that has been submitted by him.

MONDELET, Justice: I consider the judgment of the Court below, condemning Appellant to render an account, and affirming the rights of Plaintiff to $\frac{1}{10}$ of the net proceeds of the mine to be correct. It matters very little whether the mine was worked by Davies or by Sleeper. Davies agreed to explore the mine, and $\frac{1}{10}$ part of the net proceeds belongs to Plaintiff. It follows that the account rendered by Davies, is predicated upon a false assumption. It is consequently right that he should render a new account. I am therefore of opinion that the judgment of the Court below shonld be confirmed.

Judgment confirmed. (13 *D. T. B. C.*, p. 217, et 14 *D. T. B. C.*, p. 288.)

STUART, H. for Appellant.

ROBERTSON, A. and W. for Respondent.

INTERPRETATION OF A CONTRACT.

SUPERIOR COURT, Montreal, 31st October, 1864.

Coram SMITH, J.

CUSHING *vs.* DAVIES.

Held: That an undertaking by a purchaser of a mining lot, to account to the vendor for "one-tenth part of all net profits to result, after deduc-" tion of losses and charges, from all such mining operations as he shall " carry on in and upon" the property sold, is not bound to account for more than one-tenth of the amount actually realized by him, under an agreement with a practical miner to work the mines at his own risk and costs, and deliver over to the purchaser a certain proportion of the ore, dressed for market.

PER CURIAM: This is an action to account brought against Defendant to account for the proceeds of the Acton Mines, sold by Plaintiff to Defendant, under deed of sale of the two lots of land, on which the mine was supposed to be. The Defendant pleaded that he was ready to account under the said

deed, for all that Plaintiff was entitled to claim, had always been so, and that in fact he did account and fyled certain statements shewing the net proceeds of the mining operations on the said two lots of land. The Plaintiff replied by contesting the principle on which the account was rendered, pretending that an account was due not only of the interest of Defendant in the mine, but claiming an account of the operations of one Sleeper in the mine, Sleeper being the man who had worked the mine for Davies, under the provisions of a certain paper or agreement shewing on what terms and conditions the mine was to be worked. In order to understand thoroughly the true difficulty arising out of the pretensions of both parties, it is necessary to cite the clauses of the deeds under which the two lots were transferred to Davies, and the agreement under which the mine was worked by Sleeper. By the deed of sale by Cushing to Davies, after settling the ordinary conditions of a deed of sale, it is there stipulated, that, in the mining operations to be carried on by Davies, that a royalty of one tenth of the net proceeds of the mine should be paid over to the vendor Cushing, on these terms; "and of the further payment to be for ever made "hereafter by the party of the second part (to wit, Davies) "to the party of the first part (to wit, Cushing) of the "one-tenth part of all net profits to result, after deduction of "losses and charges, from all such mining operations, as he "shall carry on in and upon the lots, the same to be ascer-"tained to the thirty-first day of December yearly, and to be "duly accounted for and paid over within the six months "next following;" so far as this is concerned the language is plain enough. Davies was to pay over one-tenth of the net profits, after deduction of all losses, charges, disbursements for working the mine. For these net profits he has accounted. But, by the agreement made by Davies with Sleeper, Plaintiff pretends, that he has a right to one-tenth on Sleeper's profits, that is, on the profits or gains made by Sleeper in working the mine; and the following are the terms of the agreement with Sleeper: After setting out that the mine shall be worked by Sleeper, the agreement proceeds to point out and settle the remunerations which is to be paid by Davies to Sleeper, in the following terms; "All ore thence resulting, shall be "divided between them at the mine, ready dressed for mark-"et, as follows, one-half thereof to each party, until such "half shall amount to fourteen hundred dollars in value, and "thereafter two thirds to Sleeper, and one third to Davies. "Such percentage of profits as may accrue to Mrs. Cushing "under *her deed of the property to Davies*, shall be borne by "the parties rateably according to their shares of such ore."

This is the clause under which it is pretended this royalty is due on Sleeper's share. The contract is, that two thirds of the royalty to be paid by Sleeper is to be paid under the provisions of the deed from Cushing to Davies rateably, now the agreement by Cushing with Davies is that the royalty shall be one tenth on the net profits of Davies, that is, after he, Davies, shall be paid for all losses, charges and disbursements. The disbursement of Davies was what he paid for the working of the mine to Sleeper, and that was two thirds of the ore got out by the skill and at the sole expense of Sleeper. What matter was it that the disbursement to Sleeper was paid in ore instead of cash. It did not alter the essence of the contract. Davies could pay Sleeper in money or in ore, and, if the payment had been in money, could it be pretended that an amount was due by Sleeper of all the profits he might make in working the mine for Davies' benefit. Surely not. If Davies had agreed to give to Sleeper $160,000, (the supposed value of the two thirds ore accruing to Sleeper) for working the mine for his (Davies') benefit, it would have been an outlay by Davies to that extent in working the mine. In stipulating that the outlay should be in ore instead of money, Davies simply escaped any possible loss he might have suffered, if the working had turned out unprofitably. He threw this risk upon Sleeper; and he (Sleeper) assumed the risk. He trusted to the knowledge and skill he had in mining operations, and ventured on the risk. But Davies, having no such skill or knowledge, refused to accept the risk. So if no ore was found, the loss on the working of the mine would have fallen on Sleeper, and if ore was found, he was satisfied to take one third of his profits, leaving Sleeper to do the best he could with the mine to secure himself from loss. This was no violation of his agreement with Cushing, and it is not even pretended that it was in any way fraudulent. Now, in order to establish a claim of royalty over the operations of Sleeper, two things are necessary to be established under the terms of the deed to Davies. 1st That the fund on which the royalty is claimed should be a net profit, and 2nd, that it should be a net profit of Davies. It is manifest that, unless such be the case under the terms of the deed to Davies, no such royalty can be claimed. The pretension of Plaintiff is not that he has a right of royalty on the two-thirds gross return of the ore from the mine, for such a pretension would be too extravagant to be thought of for a moment; but that he is entitled to claim a royalty on the profits made by Sleeper in the working of the mine, that is on all beyond the actual disbursements incurred by Sleeper in producing the ore. To maintain such a pretension, it must appear to be founded on some

clause of the deed other than the one regulating the royalty on Davies' profits, otherwise, it must be said, that the outlay made by Sleeper is the outlay made by Davies, and the profits made by Sleeper, over his actual disbursements, are the profits of Davies: in other words, that the working by Sleeper was the working by Davies himself, and that such must be considered to be the meaning of the clause in the original deed of sale to Davies, and must also be the necessary meaning of the contract by which Davies agreed with Sleeper for the working of the mine; or, 2ndly. That the working of the mine was a joint working by Davies and Sleeper involving joint interests and joint profits, and thereby a working by Davies. As regards Defendant's contract of sale, it is clear, nothing in it can constitute so far as words can express it, any claim to take any thing more than one-tenth of Davies profits. Are then the two-thirds of the ore extracted by Sleeper to be considered as the net profits of Davies in any such way as to justify a claim on the part of Cushing for royalty? The deed from Cushing to Davies is in its nature absolute. It conveyed the property away in fee. The only reserve in favor of Cushing, apart from the Contingency of giving up the contract is in the one-tenth reserved in the shape of royalty. There is no stipulation about the manner of working the mine. Davies was free in all respect to do as he pleased, provided he did not violate his contract. He had a right either to work it himself or to do so by others. He could lease it, that is, the working of it, as he chose. He might work it by himself, or by others. He might pay for the working by money, or an equivalent in money, that is, by paying in ore. He might give money or ore, and might set apart so much of the ore extracted as would meet the money required for the working of the mine. If he had contracted with Sleeper to give him so much money for the working of the mine, it would have been a disbursement, which must have been charged out of the gross returns, before a royalty could have been claimed. If, instead of giving so much money, the payment was made in ore, what difference does it make. It was a disbursement or outlay in the one case, as in the other. It is not pretended that there is any thing illegal or fraudulent in the transaction, or that it violates any of the stipulations of the contract. If Davies would have contracted with Sleeper to work the mine for so much money, or so much ore, could Sleeper not have sublet the contract? and if he Sleeper had made money out of his contract, or the sub-contractor out of his, could the profits made by one or the other have been considered a profit made by Davies? Surely not; otherwise there can be no meaning in words. In fact, it was no more than a

disbursement or outlay made to obtain the ore; and if a portion of it went to pay this outlay, it must be considered as a fair outlay, or a disbursement, whether it be made by Sleeper or Davies or any one else; and if it is an outlay or charge on the working of the mine, it cannot by any means be considered a profit, and if not a profit it is clearly not subject to royalty. It has been argued, in fact, it forms one of the grounds of the judgment already pronounced in a similar case between the same parties, by the Court of Appeals, that the mine was worked conjointly, or in participation, or by some kind of partnership. It does not appear to be so: nothing in the stipulation of the parties can make it so. On the contrary, the reverse in the case, as it is the fact, for Davies in no way participated in the profits of Sleeper. In fact, the only way in which he participated was by obtaining as his profit the one-third or the ore to which the royalty attaches. In giving the working to Sleeper and in making Sleeper made all the outlay by paying him two-thirds of the ore, or its value, it became a mere outlay as any other would be, and a necessary expense in working the mine. He (Davies) saved himself from all loss, and threw the contingency of there being ore enough to pay Sleeper's expenses on Sleeper himself. It was a contract of chance. There might have been ore, or there might not have been. Sleeper chose to run the risk for two thirds of the ore found. It is precisely as if Dávies paid him two thirds of the ore in money value for the expenses incurred in making the mine. To interpret this contract in any other way, is to violate the plain meaning of words, and the construction of contracts, and to make that to be a profit which by the very contract and words used by the parties themselves, is intended to be a disbursement. It is also pretended that by the stipulation in Sleeper's contract by which he was to bear a proportionate share of the royalty, that it was thereby meant by the parties, themselves, and intended to shew that the royalty should extend over any profit which Sleeper might make in making the outlay. But such an interpretation is forced and quite contrary to the plain common sense of the terms used. It speaks of sharing Davies' royalty alone with Sleeper. Apart from the two-thirds of the ore to be paid by Davies, he stipulated that he (Sleeper) should pay two-thirds of *his* (*Davies*,) royalty. Davies charged Sleeper with an additional outlay; no doubt Davies thought that the outlay by Sleeper was very large, and he, therefore, saddled him with the payment of two-thirds of his (Davies) royalty to he paid to Cushing. This cannot change the original contract in any way. If Sleeper's outlay is to be considered a disbursement, it is consistent then

with the evident intention of the parties; for, otherwise, it would be to declare that Sleeper should pay a royalty on his own disbursements, which would be evidently inconsistent with the contract of the parties. In coming to a conclusion different from that arrived at by the Court of Appeals, I have done so, after great reluctance and after a careful study of the rights of the parties in a case involving a large sum of money; but I have not been able, after the most careful examination, to come to any other conclusion. I regret this the less, however, as this judgment may be immediately revised by the Court of Review, and afterwards again by the Court of Appeals; and, if any error exist, either in the reasoning on, or in the conclusions to which I have arrived, it may be rectified, and justice done to both parties.

"The Court, considering that Defendant hath rendered an account of all the net profits made by him (Davies), under the contract made and entered into by him with Job A. Cushing, and that Plaintiff had failed to show any right in law, or by reason of any of the clauses of the deed of sale, by Cushing to Davies, or by reason of any clause or undertaking in the agreement made by Davies with Sleeper; and, further, considering that the two-thirds of the ore got out of the mine, and stipulated to be given to Sleeper for working the mine, must be considered in law and by force of the said agreement to be a mere disbursement or outlay made by Davies under his deed from Cushing, and nothing more, and cannot be considered in law or by the contract to be a net profit, or any profit at all to which any royalty could by law or the contract attach. The Court doth dismiss the contestation of Cushing, in so far as concerns any claim for royalty on the operations of Sleeper, and doth allow the parties to *débattre le compte rendu* as they may be advised by law. (9 *J.*, p. 69.)

A. and W. ROBERTSON, for Plaintiff.

HENRY STUART, Q. C., for Defendant.

SAISIE-ARRET AVANT JUGEMENT.—COMPETENCE.

COUR SUPÉRIEURE, Montréal, 28 février 1865.

Coram BERTHELOT, J.

COULOMBE *vs.* LEMIEUX.

Jugé : Que, nonobstant que le domicile du Défendeur soit en dehors du district où l'émanation de la saisie-arrêt avant jugement ait eu lieu, et que le Défendeur n'y ait pas été assigné, les faits de fraude qui lui sont imputés comme ayant eu lieu dans un district étranger, sont attributifs de juridiction. Vide 5 *R. J. R. Q.*, p. 452. *Richer* vs. *Mongeau.*

Le 30 novembre 1864, un writ de saisie-arrêt conservatoire fut émané, pour saisir-arrêter toute la cargaison d'huîtres appartenant au Défendeur, dans une goëlette mouillée au port de Montréal. Le Demandeur, par sa déclaration, alléguait : " qu'en la cité de Québec," le 24 septembre 1864, le Défendeur l'engagea, ainsi que sa goëlette, par marché sous seing privé, pour aller en bas de Québec, dans le golfe Saint-Laurent, chercher une cargaison d'huitres, pour le compte du Défendeur, qui devait être ensuite conduite à Montréal, pour y être vendue pour le profit du Défendeur, et ce marché avait été fait pour £45 par mois, payable sans terme, tout le temps que la goëlette et son équipage seraient employés ; que le Demandeur ayant exécuté ce marché et ayant un lien et privilège spécial pour le paiement de son frêt établi par tel marché avait droit à une saisie conservatoire avant jugement sur cette cargaison, vu que le Défendeur, dans le but de le frauder, disposait de cette cargaison à vil prix, et il concluait à l'émanation de ce writ et au paiement de sa créance. La saisie fut faite d'environ 80 quarts d'huîtres à bord de cette goëlette, mais le Défendeur qui était domicilié à Québec ne pût être assigné. Le Défendeur ayant néanmoins comparu, produisit une exception déclinatoire en ces termes : " Que le Défendeur n'est pas " justiciable de cette cour, mais bien dans le district de Qué- " bec, où le Défendeur a son domicile, et ce pour les raisons " suivantes : 1° Parce que le Défendeur n'a pas son domicile " dans le district de Montréal ; 2° parce que le bref de som- " mation n'a pas été signifié au Défendeur personnellement " dans le district de Montréal ; 3° parce que la cause de l'ac- " tion n'a pas originé dans le district de Montréal." Le Demandeur répondit " que l'action intentée par le Demandeur a pour but, la conservation de son privilège sur le gage qui lui assurait le paiement de sa créance contre le Défendeur, savoir : la cargaison d'huîtres saisie, laquelle se trouvait alors au port de Montréal, dans les limites de la juridiction de cette cour ; parce que, de plus, c'est par suite de la fraude du Défendeur, qui étant alors en la cité de Montréal, dans les limites de la

juridiction de cette cour, a vendu à vil prix, en la cité de Montréal, toute la cargaison d'huîtres, dans le but de frustrer le Demandeur de tout recours sur icelle, que ce dernier a été forcé de recourir à la protection des tribunaux de ce district; et le Demandeur met en fait que le Défendeur s'est par là soumis à la juridiction de cette cour."

JETTÉ, pour le Demandeur : L'objet de l'action du Demandeur était de mettre sous la main de la justice, la cargaison d'huîtres par lui transportée, pour le compte du Défendeur, et sur laquelle il avait un privilège qu'il était en danger de perdre par la fraude du Défendeur qui avait vendu cette cargaison à vil prix. Ce que le Demandeur cherchait par son action, c'était donc, non pas tant une condamnation contre le Défendeur, que la conservation de son privilège, par la voie de la saisie-arrêt conservatoire. Or son fret n'était dû qu'au terme de son voyage, et son privilège n'était acquis que là, et alors. Angell, ou Carriers, no. 400. C'était donc là, c'est-à-dire ici, qu'il avait droit de l'exercer. En second lieu, le Demandeur soumet : Qu'il a été forcé par la fraude du Défendeur de prendre ici les procédés auxquels il a eu recours pour se protéger. Le Défendeur se rend de Québec ici, et y vend à vil prix sa marchandise, à l'insçu du Demandeur et pour le frauder. La livraison est déjà commencée lorsque le Demandeur s'aperçoit que ses intérêts sont en danger. Pourrait-il prendre le temps d'aller faire son affidavit à Québec, pour y obtenir un bref de saisie-arrêt qui ne serait arrivé ici qu'après livraison complète de la cargaison ? On dit, mais il pourrait s'opposer à cette livraison. Oui, mais la saison était alors extrêmement avancée, (30 novembre), le Demandeur ne pouvait pour garder cette cargaison d'huîtres dans son bâtiment, s'exposer à voir son bâtiment pris dans les glaces. Le seul moyen qui lui restait, était donc de mettre ces huîtres sous la main de la justice, sauf à faire prononcer ensuite sur sa créance. De plus, l'acte frauduleux du Défendeur qui a forcé le Demandeur d'adopter la saisie contre lui *a été commis dans ce district*. Or, c'est là, la cause d'action du Demandeur, car cette action n'est que l'exercice du privilège que le Défendeur par sa fraude mettait en péril. *Sénécal* vs. *Pacaud*, 8 *R. J.R.Q.*, p. 439.

" La cour considérant que les faits de fraude imputés par le " Demandeur au Défendeur dans et par la déclaration, comme " ayant eu lieu en la cité de Montréal, ainsi qu'il est admis par " le Défendeur, ont pu donner ouverture, au profit du Demandeur, à l'exercice de la *saisie-arrêt conservatoire* par lui " pratiquée à la suite du writ ou mandat de *saisie-arrêt* émané " et, par conséquent, à l'action du Demandeur, a débouté et " déboute la dite exception déclinatoire." (9 *J.*, p. 73.)

LESAGE et JETTÉ, avocats du Demandeur.

DORION et DORION, avocats du Défendeur.

LIABILITY OF MUNICIPAL CORPORATION FOR DAMGES IN STREETS.

SUPERIOR COURT, IN REVIEW,

Montreal, 30th September, 1865.

Présent: BADGLEY, J., BERTHELOT, J., and MONK, J.

HUMPHIRIES *vs.* THE CORPORATION OF MONTREAL.

Held: That the corporation of a city is liable in damages for an accident which occured, in consequence of part of a street being encumbered with building materials to more than half its extent, and not protected by a light at night.

Plaintiff, alleging that, on the night of the 25th August, 1864, he sustained severe injuries by running his horse and carriage, in Bleury street, in Montreal, against certain piles of stone, brick and other building materials, encumbering the street opposite a house in course of construction, and that his horse and harness were much injured, claimed from Defendant $400 for damages. The plea was that Defendant never obstructed the street, and that such obstruction, if any existed, which they denied, was not made by the orders or with the privity or consent of Defendant. It was proved that the street was encumbered as alleged by Plaintiff; that Plaintiff, while endeavoring to pass another vehicle, was thrown heavily from his carriage, broke his collar bone, and lay insensible on the ground. His horse and harness were also much injured. He himself was for a long time unable to earn his livelihood, and required medical attendance. The Superior Court, at Montreal, BERTHELOT, J., on the 31st March, 1865, gave judgment in favor of Plaintiff. Here follow the remarks of the court of first instance and the judgment of said court.

PER CURIAM: The court considers that the accident occurred through the negligence of the corporation in allowing the street to be unduly encumbered. The amount demanded, considering the severe nature of the injuries, is not excessive, and the court feels justified in giving judgment in favor of Plaintiff for the entire sum of £100.

"La cour, considérant que le Demandeur a suffisamment prouvé les allégués de sa déclaration, et, particulièrement, que, le 25 août dernier, dans la nuit, cette partie de la rue Bleury (une des rues publiques de cette cité) entre les rues St. Catherine et Sherbrooke, était obstruée en contravention de la loi et des règlements faits par les Défendeurs à cet égard, et que, par suite de ce, le Demandeur en passant dans la dite rue a été renversé de sa voiture, et a souffert des blessures ou des fractures qui l'ont rendu depuis et pendant longtemps incapable de travailler, que sa voiture a été brisée et que par et à raison

de tout ce que dessus, il a souffert, des dommages qui sont prouvés être et raisonnablement estimés à la somme de £100, a condamné et condamne les Défendeurs à payer au Demandeur la somme de £100, avec intérêt de ce jour et les dépens."

BADGLEY, J.: The action was founded upon injuries sustained by Plaintiff, a cab driver, whose vehicle was overturned in a street of the city, at a late period in the evening, when there was no negligence on his part. The circumstances were as follows: a house was being built in a certain street, and the parties building the house encumbered the street, not only to half, but even more than half its extent, with building materials. On the night of the accident, Plaintiff was driving his cab and drove up against a part of these building materials, consisting of large and cumbrous stones. The cab was upset and the horse much injured. Plaintiffs' collar bone was broken, his shoulder dislocated and he suffered much inconvenience, pain and trouble. The medical man who attented him states that, at the present time, months after the accident, his arm is still weak, and, that it is almost impossible for him to use his fingers. The question now arises, was the corporation guilty of negligence? The evidence showed that the street was greatly encumbered with stone and building materials. More than that, a little further down and within a few paces of the spot, a large quantity of fire wood was lying, so that the carter was obliged to make a turn before reaching the place of the accident. There were no lights in the street that night, and what was worse, there were no lights at this dangerous spot to protect passengers who might be obliged to go along that way. Not only this, but the street inspector was sick, and the person employed in his place had gone up and down the street for weeks previous, without having done any thing to guard against such accident. Under these circumstances the court must confirm the judgment of the Superior Court, which awarded Plaintiff $400 damages. Judgment confirmed. (9 *J.*, p. 75, et 1 *L. C. L. J.*, p. 65.)

DOHERTY, attorney for Plaintiff.

STUART and ROY, attornies for Defendant.

FEMME RENONÇANT A COMMUNAUTE DECHARGEE DES DETTES.

SUPERIOR COURT, Montreal, 31st March, 1865.

Coram BADGLEY, J.

PLESSIS dit BÉLAIR *vs.* DUBÉ.

Held: That by the effect of a judgment of *séparation de biens* duly executed, the wife is exempted from any liability by her previously incurred during the community, as security, *caution*, for her husband. (1)

The following judgment sufficiently explains the facts of the case; "The Court considering that, at the date of the *acte de conventions* fyled by Plaintiff, and dated the 19th October, 1863, and upon which this action was instituted against Defendants, Appolline Dubé and her husband, Hubert Gravel, and the other Defendant, an action was pending at the suit of said Plaintiff against said Defendants for the recovery of a note *en brevet* dated the 18th day of February, 1861, executed by Appolline Dubé and Hubert Gravel, and their two children therein mentioned, in favor of Plaintiff for sum of money therein mentioned. Considering that the said *acte de conventions* was made and executed by her and her husband, together with the other Defendant, their daughter, for the settlement of the said debt and for discontinuance of the said action. Considering that the said debt was a debt *de Communauté*, contracted during the community of property which then existed between Appolline Dubé and Hubert Gravel, her husband, and that the community of property between them was terminated by a judgment of *séparation de biens* in her favor against her husband, rendered by the Superior Court, here, on the 24th day of April, 1863, afterwards duly executed, and that Appolline Dubé duly made and fyled her renunciation to the community on the day following the date of said judgment. Considering that, by law and the effect of the judgment of separation and of her renunciation of the community, she could not, in law, incur any liability whatever with her husband, Hubert Gravel, and that said *acte de conventions* was, as regards her, absolutely null and void to all intents and purposes whatever, doth dismiss the action against Appolline Dubé. And considering that Plaintiff hath established the allegations of his declaration against the other Defendants, Hubert Gravel, père, and Appolline Gravel, doth adjudge and condemn Hubert Gravel, père, and Appolline Gravel, jointly and severally, to pay

(1) 2 R. J. R. Q., p. 45, Bertrand et Saindoux, et art. 1382 C. C.

and satisfy to Plaintiff the sum of $229-62, balance of a larger sum, due under and by virtue of the said *acte de conventions* of the said 19th October, 1863, with interest thereon from the 16th September, 1864, (9 J., p. 76.)

GIROUARD attorney for Plaintiff.

PARISEAULT attorney for Defendant.

VENTE D'UNE CREANCE RESULTANT D'UN JUGEMENT.

SUPERIOR COURT, Montreal, 31st March, 1865.

Coram BADGLEY, J.

BERGEVIN dit LANGEVIN et al., *vs.* PERSILLIER dit LACHAPELLE *et vir.*, and the same, Opposants, and MELOCHE, Intervening party.

Held: That a judgment debt being legally susceptible of transfer, and having been legally transférred, the assignee (*cessionnaire*) has the right to enforce the judgment in the name of the judgment creditor. (1)

Plaintiff having obtained, on the 28th October, 1858, a final judgment against Defendant for the sum of £61, transferred that judgment to the *auteurs* of the intervening party, by a deed of *cession* passed on the 28th January, 1859, before Gervais, N. P. The transfer by Pierre Lemieux, fils, to the intervening party, was never served (*signifié*) on Defendant. In the transfer from Plaintiff to Pierre Lemieux, père, no clause is to be found authorising the assignee (*cessionnaire*) to use the name of Plaintiff in issuing the execution, *writ de bonis*. The Defendant, having made an opposition *à fin d'annuler*, to the seizure of her goods and chattels, on the ground that the judgment had been transferred by Plaintiff to Pierre Lemieux, père, who had transferred the same to Pierre Lemieux, fils, and, afterwards, by the latter to the intervening party Meloche, and that the execution could not issue in the name of Plaintiff, Meloche intervened, as *cessionnaire* of the latter, and contested this opposition as unfounded in law and illegal.

"The Court' having heard the Opposant and the intervening party, contesting said opposition, by their counsel, as well upon the *défense en droit* fyled by the said intervening party to the said opposition as upon the merits thereof, the Plaintiffs having declared that they do not admit nor contest the said opposition, examined the proceedings and proof of record, and having, upon the whole, duly deliberated, and considering that the allegations in the opposition of Opposant, Defen-

(1) V. art. 1570 C. C.

dant in this cause, are not sufficient in law to maintain the opposition; and, considering that the judgment debt and judgment were legally susceptible of transfer, and have been legally transferred to intervening party: considering that the mutation of the judgment creditor is not a change in the right of execution, and that the intervening party as *cessionnaire* of the judgment obtained by Plaintiffs against Defendant, Angèle Persillier dit Lachapelle, on the 28th October, 1858, and of their rights therein, has a legal right to enforce and execute the judgment for his own interest in the name of Plaintiffs judgment creditors, doth reject the opposition." (9 J., p. 78.)

GIROUARD, attorney for Plaintiff and intervening party.

MÉDERIC LANCTOT, attorney for Defendant.

PROCEDURE.—DECLARATION.

COUR SUPÉRIEURE, Québec, 11 novembre, 1862.

Présent :—TASCHEREAU, J.

LAMPSON, Demandeur, *vs.* TAYLOR et al., Défendeurs, et HUGHES et al., Reprenant l'instance.

Jugé : Que dans une action pétitoire une défense alléguant la prescription trentenaire basée sur la possession du Défendeur et de ses auteurs, la possession des auteurs qui est invoquée doit être spécialement alléguée avec les noms des auteurs.

This was a petitory action whereby Plaintiff claimed an emplacement and buildings thereon erected. The action was met by a *défense au fonds en droit*, a *défense au fonds en fait*, a temporary exception and a perpetual exception containing three counts. In the first count of this perpetual exception, it was alleged that, on the 12th May 1834, one Edward Harbottle had obtained from J. B. Laporte, then proprietor in possession of the premises in question, a lease of the same for three years, from May, 1835, to May, 1838; that Harbottle had occupied these premises until the expiration of the lease, and afterwards by *tacite reconduction* till the year 1843, that Defendants then continued the business of Harbottle on the premises, and, for this purpose, leased them from Laporte by a verbal lease, under which they occupied until the 9th September, 1850, when they obtained a notarial lease from E. Baird, under which, and the *tacite reconduction* of the same, they continued to occupy the premises as lessees till the 1st May, 1858. That the rent had been duly paid up to this day *de bonne foi*, and, consequently, they could not

now be called upon to pay it again. The conclusion was for the dismissal of Plaintiff's action. In another count, Defendants alleged that they had, by deed of sale dated at Quebec, on the 25th March, 1857, acquired the premises in question, that they and their predecessors had, *continuellement, franchement, publiquement et sans inquiétation*, possessed the same, for more than thirty years, and that they and their predecessors whose rights they invoked, having possessed these premises, had acquired prescription thereof, and this prescription they set up as a *fin de non recevoir*, and concluded that Plaintiff's action should be dismissed. To this plea Plaintiff demurred.

LAMPSON, in support of demurrer contended, that, granting each of the counts contained in the perpetual exception intrinsically good in law, and an answer in bar to the demand, it was still impossible that these reasons or grounds of exception could all stand together, because they were contradictory and inconsistent, the first alleging that the Defendants had been mere lessees, and the last claiming the benefit of a prescription that runs only in favor of proprietors, but that none of these counts was in itself a valid plea. The first set up a claim to exemption from the payment of the rents &c., of the property during the time it was occupied by Defendants because they occupied as mere lessees; but if Defendants had been *bona fide* lessees they had forfeited all such exemption by contesting Plaintiff's right to the property, and pleading to the merits of the action. If mere lessees, they should have availed themselves of the sure protection provided by the law, they might and should have called in their landlord *en garantie*, or else have pleaded that they did not occupy as proprietors, but merely as lessees, and have declared the name and residence of their lessor. (1) But they had not adopted either of these methods, and had, by their defence, assumed the responsibility of Defendants claiming to be proprietors of the property claimed. Having thus entered into litigation, in which as mere lessees they had no interest, they could only avail themselves of such pleas as might be used by a Defendants claiming to be the proprietor. They could not first deny Plaintiff's ownership and contest his action, and, if unsuccessful in this, escape the consequences by asserting themselves to be mere lessees; on the contrary, if Plaintiff could show that his right of action was well founded, Defendants must be condemned to pay the rents, issues &c., for the duration of their occupancy, as well as to quit and restore the property. As to the pretended lease from Baird, it was not properly

(1) Poth., *Traité de Propriété*, No. 290.

pleaded, as there was no allegation that Baird was ever in possession of the property, or that he ever had any right or even claim to it, or authority to dispose of it. This count contained no denial whatever of Plaintiff's right to the property, and the allegations contained, even if true, could only warrant a conclusion for exemption from the payment of the rents &c, previous to May, 1858, yet the plea concluded for the total dismissal of the action. There remained now the last count, and the allegations of this were so vague and indefinite that they afforded no matter to be answered by Plaintiff. In the first count the *reprenants l'instance* for Defendants had set forth a pretended lease from one Baird without any allegation that he had a right to grant such a lease, and, in this count, they set forth a sale without stating who the vendor was, or that he had ever been in possession of the property, or had any right to or over it, without producing any deed of sale. Again, the plea of prescription was insufficiently set forth; the plea set forth that Defendants and their predecessors had held the property for 30 years, but had not alleged who their predecessors were, and Plaintiff was called upon to deny the right of certain persons without being told who they were. It might be true that a person who had had open and peaceable possession himself for 30 years had no need of any title, but when a party had only had possession for a portion of the 30 years, and to establish his prescription invoked the rights and possession of his predecessors who held during the other portion of the requisite time, he must, in order to derive advantage from their possession, allege and show that he was lawfully in their place and stead, and continued their occupancy, and is entitled to enjoy their rights.

MALOUIN, for Defendants, urged in answer to the demurrer: 1o. That the 1st ground of exception was legal, inasmuch as Defendants alleged that they had held the property in question as lessees, and that they had, in good faith, paid to their lessor the annual rent of the premises in question, that, by their plea, they shewed that another party had held the property and not Defendants, and they indicated to Plaintiff the name of the party who had held that, therefore, they could not be made to pay the rent of the property twice; that, although Defendants had prayed, by the conclusions of their plea, for the dismissal of Plaintiff's action, still the plea was good, and all the Court could do would be to mo lify the conclusions by granting less than they prayed for. 2o. That as to the last ground of exception there could be no doubt as the prescription invoked by Defendants was the prescription of 30 years, and that, under the law of France, it was not ne-

cessary to set up any title, even though a party invoked the possession of their predecessors: That Defendants had the right to prove by oral or parol testimony as well the possession of their *auteurs*, as their own. Pothier, *Traité de la Prescription*, Vol. 4, No. 172, expressed himself in very plain terms; he says: "Sur les qualités que doit avoir la possession, il y a cette différence entre la possession de 10 ou 20 " ans et celle-ci..... au contraire, pour la prescription de " 30 ans, il n'est pas nécessaire que le possesseur produise le " titre d'où procède sa possession." He further argued that, although he had not produced the titles of his *auteurs*, still he had produced his own title, which he was not bound to do: he referred the Court to the Case No. 1484, Alford and Julien *et al.*, in the Superior Court of Quebec, in which case, in September, 1862, Mr. Justice Stuart held that it was not necessary to allege the titles of the *auteurs*, when the 30 years prescription was invoked, and that the plea in the present cause was a copy of the plea which was there maintained. He also referred to Nos. 171 and 176, of the fourth Vol. of Pothier, "De la prescription" to show that Defendants had the right to invoke the possession of their *auteurs*, and also to adduce oral testimony to prove the 30 years prescription.

JUGEMENT: "Considérant que, ni l'action du Demandeur, ni le second chef de l'exception péremptoire en droit perpétuelle des reprenants l'instance n'allèguent aucune relation de locateur et locataire entre le Demandeur et les Défendeurs, et que l'action du Demandeur est au pétitoire; considérant que, par le dernier chef de leur exception péremptoire en droit perpétuelle les reprenants l'instance plaident une prescription de trente ans par eux et leurs prédécesseurs, dont ils invoquent le droit et cause, n'indiquant pas les noms de leurs prédécesseurs ou la possession plaidée, la cour déclare le dernier chef d'exception insuffisant, maintient la réponse en droit du Demandeur au dit chef, et le renvoie. (13 *D. T. B. C.*, p., 154.)

LAMPSON, GEORGE, for Plaintiff.

LÉGARÉ and MALOUIN, for the Defendants and reprenants l'instance.

CAUTIONNEMENT EN APPEL.

CIRCUIT COURT, Montreal, 27 février 1863.

Before: MONK, Justice.

FISHER, *vs.* PROVENCHER et al.

Jugé: Que des cautions en appel sont tenues des frais d'appel dans le cas où le jugement de la Cour Inférieure, rendu dans une action hypothécaire, est confirmé, quoiqu'un délaissement soit fait par les Défendeurs avant signification du jugement de la cour de première instance, et quoiqu'aucun jugement ne fût rendu en Cour Inférieure pour les dépens, mais seulement un jugement condamnant les Défendeurs à payer la dette et les frais, si mieux ils n'aimaient délaisser la propriété hypothéquée. (1)

MONK, Justice: This is an action brought in November, 1862, against Defendants as sureties in appeal for Josephte Ambault, Defendant in a cause instituted by the present Plaintiff against her in the Superior Court. The Defendants plead that the judgment of the Court, which was in an hypothecary action, gave Defendant option of giving up the property within fifteen days from the signification of the judgment, or paying the condemnation money *and costs*, and that she had made a *délaissement* in due form on the 9th day of September, 1862, four days after the judgment was rendered in appeal, and that, therefore, neither Appellant nor her sureties were liable to costs, there being no absolute condemnation for costs. It is true that, by the judgment appealed from, it was "adjudged, that Plaintiff do recover from Defendant, "as *détenteur* of the lot, the sum of £50.4.4, interest due as "aforesaid, *and the costs* of the present suit, unless Defendant "prefer to and do, within fifteen days after the signification "of the present judgment, quit and abandon the lot, to the "end that out of the proceeds thereof Plaintiff be paid." It is true also that the judgment rendered in appeal simply confirms the judgment. The judgment below should have condemned Defendant to costs absolutely, but this action which is only for the costs in appeal must be maintained. Judgment for Plaintiff. (13 *D. T. B. C.*, p. 160.)

TORRANCE and MORRIS, for Plaintiff.

DUNLOP and BROWNE, for Defendants.

(1) V. art. 1122 C. P. C.

PROMISSORY NOTE.—PAROL EVIDENCE.

CIRCUIT COURT, Montreal, 24th March, 1863.

Coram MONK, J.

JOHNSON et al *vs.* GEOFFRION.

Held: That when an endorser of a Promissory Note has been discharged from his liability by the fact of the note not having been protested for non-payment after it became due, a subsequent verbal promise made by the endorser to pay the amount of the note notwithstanding his release may be proved by parole evidence, and binds the endorser. (1)

A promise to pay a note, made by the endorser who had been released by omission to protest, to the lawyer of the holder of the note, is as binding as if such promise had been made to the holder himself.

PER CURIAM: The Defendant was the endorser of a promissory note which, not having been protested after maturity, he was, by law, discharged from his liability. After the note became due, Defendant went to Plaintiff's lawyer and said that he would not take advantage of his release arising from the note not having been protested. He was a man of honor, he would pay the note. A few days afterwards, Defendant wrote a letter to the lawyer in which he stated that he would still be responsible for the payment of the note, if the maker did not pay it. This letter the lawyer burnt, not considering it necessary to hold it, as he considered the Defendant to be a man of honor. An action was taken against the makers of the note and a considerable sum was expended in costs, but without a successful result. Plaintiffs then brought this action against the endorser, who defended it on the following grounds: 1st. Because he had made no absolute promise to pay the note. 2nd. Because a promise to pay such a considerable amount could not be proved by *parole evidence.* 3rd. Because a promise made to the party's lawyer was not binding. The evidence shews that the first objection is unfounded: the testimony of the lawyer is positive that Defendant stated to him that he was a man of honor and would pay the note, and that Defendant also wrote a letter to the same effect which was destroyed. As to the second reason, it has been held in England that where the endorser of a note released by non-protestation, afterwards promises to pay such promise can be proved by *parole evidence.* In France, such a promise could also be proved by *parole evidence*; there it would be held that there was a *commencement de preuve par écrit.* The third reason is unfounded: a party's lawyer is his agent; and

(1) V. art. 1233 C. C.

a promise made to him is as good a promise as can be made. Judgment for Plaintiffs. (7 *J.*, p. 125 et 13 *D. T. B. C.*, p. 161.)

J. A. PERKINS, Jr., for Plaintiffs.

C. ARCHAMBAULT, for Defendant.

OPPOSITION A FIN DE DISTRAIRE.—SEIZURE OF MOVEABLE EFFECT.

CIRCUIT COURT, Montreal, 18th May 1863.

Coram MONK, J.

YON *vs.* O'CONNOR and O'CONNOR, Opposant.

Held: 1. The mere allegation, in an opposition *à fin de distraire*, by Defendant, that the goods seized form part of his [Defendant's] tools, or implements of trade, is insufficient to maintain such opposition. (1)

2. It is not necessary for a Bailiff seizing, to allege in his *procès-verbal* of seizure, that he has left to Defendant the effects exempt by law. (2)

Plaintiff, having obtained judgment against Defendant, took out an execution against his goods. Defendant opposed the seizure on the following grounds: 1st. Because the articles seized, form part and portion of his tools, or implements of trade as tailor; and that several of them are necessary for the carrying on of his trade; 2nd. Because the Bailiff seizing, did not leave him the articles allowed or exempted by law, in virtue of the 3rd Section of the Consolidated Statutes for Lower Canada, chapter 85, and did not make mention thereof; 3rd. Because the Bailiff seizing should have specially alleged or set out that he had left to Defendant the goods, chattels, or effects exempt by law. Plaintiff having contested the opposition, it was decided by the Court, that Opposant, who claimed certain articles as forming part of his tools or implements of trade, and, as such exempt by law from seizure, should have proved that such articles were necessary for the carrying on of his trade, and that the mere enunciation of it was not sufficient. As to the third reason, it was no ground for opposition. Opposition dismissed. (7 J., p. 126.)

L. RICARD, for Plaintiff.

KERR and NAGLE, for Opposant.

(1) V. art. 582 C. P. C.

(2) V. art. 560 C. P. C.

SEPARATION DE BIENS.

SUPERIOR COURT, Montreal, 24th December 1862.

Before SMITH, Justice.

SWEETAPPLE *vs.* GUILT.

Jugé: Qu'un jugement en séparation de biens peut être rendu dans une cause où les parties se sont mariées dans le Haut-Canada, où il n'existe aucune communauté de biens, et aucun contrat de mariage n'étant intervenu entre les parties. (1)

SMITH, Justice: This is an action *en séparation de biens.* The parties were maried in Upper Canada, in 1845, and appear to have removed to Lower Canada in 1859. The only question is whether a separation of property can be granted, there having been no *communauté de biens* established, either by marriage contract, or by the law of Upper Canada: I am disposed to follow what has already been held in this court, that a judgment *en séparation* can be granted in a case like this, which will at least have the effect of preventing the wife's future acquisitions from falling under the authority of the husband.

JUDGMENT: " It is considered and adjudged that Plaintiff shall and may, from the date of her demand, to wit: from the sixth day of November, 1862, (date of service of process in this cause) hold, possess, use, administer and enjoy, separately and apart from Defendant, all and every her estate and property, real and personal, moveable or immoveable, as well those which belonged to her before her marriage with Defendant, as those which have accrued or shall hereafter accrue to her, and to which she is now or may hereafter become in any way entitled, without molestation, trouble or hindrance, by or on the part of Defendant, or any person whomsoever. And the court doth adjudge and condemn Defendant to guarantee, acquit and indemnify Plaintiff from and against all and every the debts, sum or sums of money for which he may have caused Plaintiff to be jointly with him liable or responsible." (13 *D. T. B. C.*, p. 167 et 7 *J.*, p. 106.)

PERKINS, for Plaintiff.

(1) V. art. 1311 C. C.

VENTE

SUPERIOR COURT, Montreal, 17th February, 1863.

Before MONK, Justice.

MCKENZIE, *vs.* JOSEPH.

Jugé: 1° Que dans une action pour un installement sur un prix de vente, le Défendeur ne peut refuser de payer, ou demander caution, par la raison que par l'avertissement de l'encanteur et ses conditions de vente, la propriété était désignée comme un emplacement &c., &c.," avec " droit de mitoyenneté sur le pignon des bâtisses appartenant à C., ou " ses représentants." l'acte de vente subséquemment exécuté ne faisant aucune mention de mitoyenneté.

2° Que les termes du contrat de vente seront regardés comme contenant le contrat final entre les parties, en autant qu'il n'existe aucune preuve du contraire, ou que le Demandeur avait autorisé les conditions dans l'avertissement de l'encanteur, ou avait consenti une vente avec le droit de mitoyenneté mentionné en icelui.

This was an action brought to recover £200, the third instalment due under a notarial deed of sale of real property from Plaintiff to Defendant, dated the 1st June, 1859. The Defendant pleaded that he had bought the property at a public sale, made by John Leeming & Co., auctioneers, that, by the conditions of sale, of the 12th May, previous, the property sold was described as an emplacement in the West Ward of the city of Montreal, &c. " with *right mitoyen on gable of building belonging to Cuvillier or representatives, and having* sundry buildings thereon erected " at the foot of which conditions Defendant had signed an acknowledgment that he bought the emplacement for £910, " subject to all and every " the conditions of sale herein declared and read out. " That the notarial deed was only made to complete the sale, and that he was entitled to the *mitoyenneté* mentioned, but that no such right existed; that, on the contrary, the heirs Cuvillier had brought an action against him because he made use of the wall without paying for it; that Defendant had offered before action brought to pay the amount demanded on obtaining security from Plaintiff that he would indemnify him from any condemnation in the action referred to, and again tendered the money on the same condition. Answer to plea: that the property passed by the notarial deed which contained no clause as to *mitoyenneté;* that neither the auctioneers nor the party who had given them instructions, had any authority from Plaintiff to give any promise of *mitoyenneté,* and that Defendant having accepted the deed and entered into possession of the lot was bound to pay the purchase money, or take an action to have it set aside or amended, and could not set up as a defence an action brought against him by rea-

son of his own acts, and, in consequence of his unfounded pretension of a right of *mitoyenneté* not conveyed by the deed.

MONK, Justice, said that it was not shown that the conditions of sale had been authorized by Plaintiff, or even signed by the auctioneers on her behalf, and that the Court could not set aside or modify the subsequent notarial deed consented to by the parties, which made no reference to the *mitoyenneté* now contended for, and that the deed must be held as containing the true agreement of the parties by which they must be bound.

JUDGMENT: "Considering that, by deed of the 1st June, 1859, Plaintiff sold to Defendant the emplacement therein described as follows * * and the conditions of sale of the 12th May, 1859, set forth in the peremptory exception produced by Defendant and proved in this cause, cannot by law be invoked to modify, extend, limit or annull any of the conditions of the deed of sale of the 1st June, 1859, and that the parties to the deed of sale, to wit: Plaintiff and Defendant, are bound by the said deed, and by the terms and conditions thereof only: And, considering that, by law, the description of the emplacement and premises, and the limits thereof, as contained and set forth in the deed of sale of the first June, 1859, are to be reputed and to be held to be the correct description of the lot of land, the emplacement and premises sold by Plaintiff to Defendant by the last mentioned deed: Seeing that the right of *mitoyenneté* contended for and claimed by Defendant in his peremptory exception is not included, mentioned or referred to in the deed of sale of the 1st June, 1859, and was not thereby sold or transferred by Plaintiff to Defendant: Considering that, by his *peremptory* exception, Defendant admits that the *mur mitoyen* by him mentioned in his said peremptory exception did not belong at the time of the sale to Plaintiff, but to other parties therein mentioned: Seeing that it does not appear, by the evidence adduced, that either William R. Hibbard or John Leeming, the alleged agents of Plaintiff, had any power or authority from Plaintiff to bind her to the sale and transfer of a right to the *mitoyenneté* belonging to other parties, or that they, in their capacity of agents, or alleged agents, had any power or authority to insert in the conditions of sale of the 12th May, 1859, that the property was to be sold, and was sold, with right of *mitoyenneté* in the gable of the buildings belonging to Cuvillier, or representatives: Considering that Plaintiff cannot, by law, and after the execution of the deed of sale of the 1st June, 1859, be held or bound by such conditions of sale, in so far as these conditions are at variance with the deed of sale, and in so far as they exceed the powers and authority proved to

have been possessed by her alleged agents: Considering, therefor, that, both in law and according to the evidence adduced, Defendant's peremptory exception is wholly unfounded, doth dismiss the peremptory exception, and proceeding to adjudicate upon the merits of Plaintiff's demand, doth adjudge and condemn, &c. (13 *D. T. B. C.*, p. 168.)

ROBERTSON, A. and W. for Plaintiff.

DORION, DORION and SENECAL, for Defendant.

CAUTIONNEMENT POUR FRAIS.—OPPOSITION A JUGEMENT.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 9th December, 1862

Before: AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

JERSEY, Appellant, *and* ROWELL, Respondent.

Jugé: Que le Demandeur est tenu de donner avis au Défendeur que cautionnement pour les frais a été fourni, et qu'une demande de plaidoyers et une forclusion sans tel avis sont irrégulières, et seront mises de côté, ainsi qu'un jugement du protonotaire rendu dans la cause, au profit du Demandeur, traitant telle forclusion comme valable et régulière. (1)

2° Qu'un Défendeur peut être relevé d'un jugement ainsi rendu par le protonotaire de la Cour Supérieure, par opposition, ou par simple requête afin d'opposition, tel que pourvu par le Stat. Ref. du B. C., chap. 83, sec. 115, ou par un appel à la Cour du Banc de la Reine.

3° Mais s'il a recours à un appel, la cour ne lui accordera que les frais de la Cour Inférieure et les déboursés en appel.

The action was brought in the Superior Court for the district of Bedford, upon a promissory note, and an attachment before judgment was taken out. The Plaintiff, who resided out of the province, gave security for costs, but gave no notice to Defendant of his having done so; on the 15th June, 1859, a demand of plea was served at the prothonotary's office, foreclosure was filed on the 22nd June, and the case inscribed for judgment, which was rendered by the prothonotary on the same day, for the amount of the note, and declaring the attachment valid, from this judgment an appeal was taken.

DEVLIN, for Appellant, contended that all proceedings had subsequent to Defendant's motion for security for costs were irregular: 1° Because security was given without notice to the Defendant; 2° Because a demand of plea was made without notice that security had been given; 3° Because no legal demand of plea was made, and the foreclosure was premature and illegal as well as all subsequent proceedings.

(1) V. art. 128, C. P. C.

DOHERTY, contended on behalf of the Respondent : 1° That Appellant should have availed himself of the opposition allowed by law in case of judgments rendered in vacation, more particularly as the judgment had been served on him ; 2° that not having done so, the court would not interfere, on account of any trifling errors in the procedure, substantial justice having been done.

MONDELET, Justice, *dissenting*, stated in effect that the members of the court were unanimous in holding that the judgment as rendered was irregular and must be set aside. The question was as to the costs. Now the Con. Stat., L. C., chap. 83, sect. 115, provided that, where judgments were rendered in vacation, Defendant " may contest the judgment by a *simple requête à fin d'opposition.*" (1) But, by another statute he had a direct appeal to this court. This right he had exercised, and would this court now say to him that he *had* no right to be here, that he must have but one of the two remedies, or that,if he appealed, the costs of appeal would *not* be granted. The law having given him two remedies, he held that Appellant had a right to exercise either, and costs should be given as a necessary consequence.

AYLWIN, Justice, Held that, for the reason just stated, costs in appeal should be given.

DUVAL, Justice, stated in effect that, the proceedings being irregular, the jugement must be set aside and the case sent back. He was disposed to limit the costs to those which would, have been incurred on an opposition under the statute, costs being within the discretion of the court. Having a cheaper remedy, Appellant should not have come to this court on matters of mere form. Even if he had a strict right to do so. a regard for the rights of his adversary might have suggested the other course. He would concur on the whole as to the judgment to be rendered as to the costs, giving only the disbursements in this Court, which would, in all probability. be nearly the same in amount as the costs of an opposition below.

MEREDITH, Justice: This is an appeal from a judgment rendered by the prothonotary of the Superior Court, at Bedford. It is contended that the prothonotary had no power to adjudicate upon the *saisie-arrêt* which had been sued out in the court below ; but this pretension cannot be maintained. The power to adjudicate upon the action, necessarily includes the power to adjudicate upon the *saisie-arrêt*, which is simply an incident to the action. The Plaintiff ought however to have given notice when he put in security for costs. The foreclosure

(1) V. art. 483a et 484, C. P. C.

of Defendant from pleading, without notice to him of the putting in of security for costs, was irregular; and that foreclosure and all the proceedings in the Court below, subsequent to the order for security for costs, must, I apprehend, be set aside; but I would not be disposed to grant costs. The Appellant might have obtained the redress to which he was entitled by an opposition in the court below, and such being the case, he ought not to be allowed to subject the Respondent to the very heavy costs of an appeal to this court. It was said that under the statute Plaintiff had a right to renounce his judgment, and that, as he did not do so, but, on the contrary, persisted in enforcing it, he ought to pay the costs. The fact that Plaintiff did not renounce his judgment, shows that the Defendant was under the necessity of resisting the execution of that judgment; but it does not establish that he ought to have instituted a very expensive appeal, instead of filing an inexpensive opposition, and it is I think the duty of the court to discourage such appeals.

BERTHELOT, Juge: L'Intimé, Demandeur en Cour de première instance, a obtenu jugement sur un billet, en vacance. lequel jugement a été rendu par le protonotaire en vertu de la clause 23, du ch. 78, des statuts refondus. (1) Il paraît que le Demandeur s'était cru obligé de donner caution pour les frais, vu son absence du pays, puisque l'on voit qu'il a en effet donné ce cautionnement, mais sans en donner avis à l'Appelant, qui avait droit d'en avoir connaissance, ne fût-ce que pour s'opposer au cautionnement pour cause d'insuffisance. La demande de plaidoyers est faite sans aucune intimation que le cautionnement avait été donné, et elle est suivie d'une demande de forclusion du 22 juin. Puis une inscription pour jugement, qui a été rendu le même jour par le protonotaire sans billet filé ou titre de créance dans la procédure, et sans mentionner qu'il agissait judiciairement en cas d'absence ou de maladie du Juge, car ce n'est que dans ces cas qu'il peut agir,—voir clauses 24 et 25, du ch. 78, Stat. Ref., B.-C. " In certain " cases prothonotary to perform the duties of resident Judge " out of Term." Il faudrait, selon moi, que le jugement constatât par lui-même, et à sa face, la qualité du protonotaire pour agir. Pour toutes ces raisons l'appel doit réussir. Mais quant aux frais? L'on dit que le Défendeur aurait dû se pourvoir par opposition devant la cour, au terme suivant, en donnant avis de pareille opposition, trois jours après le jugement rendu. Oui, mais comment cela peut-il avoir lieu, dans le cas d'un Demandeur qui aurait obtenu jugement sans la connaissance du Défendeur, comme dans le cas actuel? Car, observons que

(1) V. art. 89 C. P. C.

le Demandeur a obtenu jugement sans donner avis de son inscription aux termes de la section 113, du ch. 83. S'il ne l'a su que lorsqu'il était trop tard pour présenter son opposition, il ne lui restait que l'appel dont il devrait avoir les frais.

JUDGMENT: Considering that the proceedings taken by Respondent, Plaintiff in the court below, are irregular and contrary to the course and practice of the Superior Court: that the security for the payment of costs given by Plaintiff was so given without due notice thereof to Defendant; that Defendant was foreclosed from the right of pleading to the action of Plaintiff at a time when Defendant was not yet bound to plead to the action, and that, by reason of the irregularities herein stated, the proceedings *exparte* on the part of Plaintiff are illegal, null and void, and did not justify the rendering of the final judgment pronounced by the court sitting at Nelsonville, on the 22d day of June, 1859, in which judgment, therefore, there is error, this court doth reverse, annul and set aside the judgment pronounced by the Superior Court on the 22nd day of June, 1859; and, proceeding to pronounce the judgment which the said court ought to have pronounced, doth declare irregular, null and void all the proceedings had and obtained in the aforesaid court, from and after the filing of Plaintiff's exhibits on the 2nd day of May, 1859, and this court, doth order that the record be remitted to the court at Nelsonville, to the end that such further proceedings may be had in the prosecution of Plaintiff's action as to law and justice may appertain. The court doth order that Respondent do pay to Appellant the costs by him incurred in the court below, and his disbursments on this present appeal. The Honorable Justices AYLWIN and C. MONDELET, *dissenting*. (13 *D. T. B. C.*, p. 172.)

DEVLIN, for Appellant.

DOHERTY, for Respondent.

FRAUDE.

SUPERIOR COURT, Montreal, 31st, December, 1862.

Before MONK, Justice.

McDOUGALL, Plaintiff, *vs.* DUBORD, Defendant, and DUBORD, *et al.*, Opposants.

Jugé: 1° Qu'une opposition faite par un Défendeur et un autre, comme associés, en vertu d'un acte de société notarié, alléguant une vente judiciaire antérieure de tous les effets saisis, à l'un des Opposants, et que tous les mêmes effets avaient été, par l'adjudicataire, placés dans le fond social comme sa mise, sera mise de côté, si la vente judiciaire et

la société sont constatées avoir été faites frauduleusement, et de concert entre l'adjudicataire et le Défendeur.

2° Que telle fraude et connivence sont suffisamment établies s'il appert que l'adjudicataire était le frère et le commis de comptoir du Défendeur à l'époque de la vente par le shérif, que les effets avaient été achetés par lui à un prix nominal, et que le Défendeur dans la cause était convenu de ne pas enchérir à la condition que sa dette et ses frais seraient déposés dans les mains d'un tiers, qui lui avait subséquemment payé le montant déposé, et que, dans l'acte de société, portant date quelques jours après vente, les effets avaient été portés à leur vraie valeur.

In this case, an opposition was filed on the 18th July, 1862, by Defendant, W. H. Dubord, and J. E. Dubord, styling themselves copartners, carrying on business under the firm of Dubord & Co., setting up that all the effects seized had been bought by J. E. Dubord, on the 30th April, 1862, at a sheriff's sale had in a cause of *Ronayne* vs. *W. H. Dubord*, and that the Opposants had since formed a partnership under the firm of Dubord & Co., on the 7th May, 1852. The opposition was contested by Plaintiff on the ground of fraud.

MONK, Justice: It appears in evidence that the whole of the furniture, beds and bedding of a large hotel, at Acton-Vale, waggons, and other property of Defendant, had been bought in for less than ten pounds, by Opposant J. E. Dubord, a brother of Defendant, and at that time his bar-keeper; that, just before the sale in the case of Ronayne, the amount of the debt and costs due in that cause, $170, had been deposited by the bar-keeper with a person in the village, to be handed to Ronayne, in case he did not bid upon any of the articles about to be sold at his suit. This he agreed to, and the monies were handed over to Ronayne after the sale; the effects were bought in by J. E. Dubord, a partnership before notaries was then formed on the 7th May, 1862, in which the effects figure as the capital put in by J. E. Dubord; upon this, it was supposed a *bonâ fide* creditor could be deprived of his recourse against the property of his debtor. This cannot be permitted for a moment; the partnership was fraudulent, and evidently contrived by both parties to defraud. The bar-keeper had nothing of his own, the sheriff's sale was part of the fraud, and the opposition must be dismissed with costs.

JUDGMENT: The court," doth maintain the contestation "made by Plaintiff, and doth dismiss the opposition with "costs." (13 *D. T. B. C.*, p. 177.)

ROBERTSON, A. and W. for Plaintiff.

DOUTRE and D'AOUST, for Opposants.

COMPENSATION.

SUPERIOR COURT, Québec, 5 février, 1863.

Before: TASCHEREAU, Justice.

JORDESON, *vs.* MCADAM, et al.

Jugé: 1o. Que la compensation d'une dette claire et liquide, ne peut être admise à l'encontre d'une demande pour dommages non constatés à l'époque de l'enfilure des plaidoyers. (1)

2o. Que, dans l'espèce, en autant que l'erreur qui avait causé l'arrestation du Demandeur provenait de l'un des Défendeurs seulement, nonobstant que la condamnation était solidaire, et contre eux tous, la Cour pouvait ordonner la discussion de celui-ci, comme principal obligé, avant qu'il fût permis au Demandeur de prendre exécution contre les autres.

3o. Qu'un Demandeur dans une action en dommages pour arrestation illégale et faux emprisonnement, n'a pas le droit de produire des témoignages pour constater les moyens des Défendeurs.

The Plaintiff complained of Defendant, McAdams, for maliciously and unlawfully suing out a writ of *capias ad respondendum*, and of Edward Burroughs and Louis Fiset, as joint prothonotary of the Superior Court, in the District of Quebec, for permitting the writ to issue without the affidavit required by law having been first duly sworn to, whereby Plaintiff was unlawfully arrested and imprisoned, and suffered damage. The Defendants, who were sued jointly and severally, pleaded *the general issue*, and, by a *perpetual exception* also filed by them, attempted to compensate so much of the *demande* of Plaintiff as the Court might award as damages, against a sum of money due McAdams for rent, and which, by the exception, he assigned, in part, and for the purposes of the plea, to his co-defendants. To this exception, Plaintiff demurred, upon the ground that Defendants could not set off the debt due for rent against the claim for damages, as the latter was not *claire et liquide*, and that the debt could not be legally compensated against the injury. The Court, by its judgment on the merits, maintained the demurrer of Plaintiff, dismissed Defendant's plea of compensation, and condemned Defendants, jointly and severally, to pay Plaintiff the sum of £16,5, damages, but, considering that all the error which caused the illegal arrest of Plaintiff proceeded from the act of Defendant, Hugh McAdams, alone, and that the other Defendants, Edward Burroughs and Louis Fiset, ought not to be bound to pay the amount, *que subsidiairement*, and in default of the solvency of McAdams, ordered Plaintiff, for the recovery of the said sum, with interest and costs, under the circumstances of the

(1) V. art. 1188 C. C.

case, first to discuss Defendant McAdams, as principal *obligé*. After issue joined Plaintiff proceeded to *enquête*, and, upon the examination of Edward Burroughs, as a witness, submitted the following questions: "Would you be kind enough to state what, since the month of June, 1826, has been about the average annual net income you have received from your office?" "Are you at present the proprietor of real or personal estate, and to what value?" Objection: The Defendant objects to these questions as being irrelevant and illegal, and because the Plaintiff has no right to inquire into the private affairs of the Defendants. The Plaintiff contended that he had a right to establish the status and means of the Defendant in an action of tort for false imprisonment, to guide and assist the Court in assessing the quantum of damages to be awarded, and cited 2 Wils, p. 205; 1st Pigeau, p. 423. Objection maintained. (STUART, Justice.) In the same cause, Quebec, 9th September, 1862. Upon the examination of McAdams, another of the Defendants, as a witness, the following questions were submitted: "Are you a proprietor of real estate in the city of Quebec?" "To what extent in value is your real estate?" Objected to by Defendants, and objection maintained. (BOWEN, Chief-Justice.) (13 *D. T. B. C.*, p. 229.)

AUSTIN, for Plaintiff.

PARKIN and PENTLAND, for Defendants.

CAUTIONNEMENT POUR FRAIS.—PLAIDOYERS.

SUPERIOR COURT, Montreal, 31 mars, 1863.

Before: MONK, Justice.

BELL, et al., *vs.* KNOWLTON, et al.

Jugé: 1o. Que lorsque deux Défendeurs font séparément motion qu'il leur soit donné caution pour les frais, des cautionnements séparés doivent être fournis, mais les mêmes cautions seront suffisantes. (1)

2o. Qu'un affidavit par un Défendeur qu'il lui faut faire recherche dans plusieurs bureaux d'enregistrement, et qu'au meilleur de sa croyance, telles recherches prendront six mois, et que sans tel délai, il sera incapable de préparer sa défense d'une manière satisfaisante, sera suffisant pour obtenir un délai pour plaider. (2)

MONK, Justice: In this case, the two Defendants made separate motions for security for costs, which security has been offered by Plaintiffs. The counsel for Defendants sug-

(1) V. art. 29 C. C., et art. 128 et 129 C. P. C.

(2) V. art. 137 C. P. C.

gests that separate bonds be given, which is opposed as causing unnecessary costs. I am of opinion that separate bonds must be given, but the same persons may be sureties in both bonds. The Defendants have also severally moved for a delay of six months to plead to this action, on an affidavit filed by each of them. "Paul H. Knowlton, one of the "Defendants, being duly sworn, saith that the action insti-"tuted against him by Plaintiff requires an examination and "search for in the registry offices of Brome and Shefford, and "elsewhere, of a large number of deeds notarial, and before "witnesses, in order to prepare his defence, and that such "search will occupy him six months to the best of his know-"ledge and belief, and that, without the delay aforesaid, he "will be unable to prepare his defence in a proper manner, "to the end that his interests may be secured, and justice be "done in the premises" which it is contended by Plaintiffs is vague and insufficient, giving no facts upon which to ground the application and shewing no diligence. I look upon the affidavit as sufficiently explicit, and a delay of three months will be allowed to plead. (13 *D. T. B. C.*, p. 232.)

ROBERTSON, A. and W., for Plaintiffs.

STUART, HENRY, for Defendants.

MANDAT.—ASSURANCE.

SUPERIOR COURT, Montreal, 17 février, 1863.

Before MONK, J.

THE MONTREAL FIRE INSURANCE CO., Plaintiffs, *vs.* THE STANSTEAD, SHEFFORD AND CHAMBLY RAILWAY CO., Defendants, *and* WOOD, *et al.*, Intervening parties.

Jugé: Que lorsque l'agent d'une compagnie de chemin de fer a donné son propre billet à une compagnie d'assurance, pour primes d'assurance maritime, sur du fer appartenant à la compagnie du chemin fer, prenant la police d'assurance en son propre nom, et subséquemment donne les billets de sa société pour la même dette, la compagnie de chemin de fer, est néanmoins responsable dans une action directe pour le montant des primes; et que, sur une intervention par la société, les billets renouvelés produits dans la cause seront déclarés être sans effet contre les intervenants, et il sera ordonné qu'ils leur soient remis.

The principal action was directed against the railway company, to recover $1,545.91, the amount of premium for a Marine Insurance, on a large quantity of railroad iron, belonging to Defendants, shipped from England to Canada. It was alleged, in the declaration, that the Insurance Company had taken the notes of Wood, the agent of the Railway Company, for the premiums, and issued a policy in his name, which notes had

been renewed, and other notes of the firm of Wood, Jones & Co., taken, none of which were paid, but were produced in court. A condemnation was therefore prayed for against Defendants. The plea of Defendants in effect admitted the facts alleged, that the notes had been taken on payment and prayed that the notes first given by Wood be declared to be novated by the notes of the firm of Wood, Jones & Co., of which he was a member. After evidence on the principal demand, an intervention was filed by the firm of Wood, Jones and Co., setting up substantially the facts, as above mentioned, and praying *acte* of the allegations of the parties, and that the notes be declared inoperative against the firm, and be declared to be cancelled and set aside.

JUDGMENT: Considering that Defendants have failed to establish, by legal and sufficient evidence, that the promissory notes mentioned in the plea were, or that any of them was accepted by Plaintiffs, or by their agents in that behalf, as payment of the premiums of insurance, for the recovery of which the present action is instituted, doth dismiss the plea firstly pleaded by Defendants; and considering that Plaintiffs have established, by legal and sufficient evidence, the essential allegations of their declaration, the court doth condemn Defendants to pay to Plaintiffs the sum of $1,545$\frac{91}{100}$, as and for the amount of premiums of insurance as mentioned and set forth in Plaintiffs' declaration; and the court, having seen the intervention, doth grant the conclusions of said intervention, and doth declare the promissory notes inoperative against the intervening parties, by and in the interest of Plaintiffs, and doth order, further, that the three promissory notes be given up to the intervening parties. (13 *D. T. B. C.*, p. 233.)

ABBOTT and DORMAN, for Plaintiffs.

DRUMMOND and BELANGER, for Defendants.

ROBERTSON, A. and W., for intervening parties.

ASSIGNATION.

SUPERIOR COURT, Quebec, 4 février, 1863.

Before STUART, Justice.

MORGAN *vs.* BENJAMIN.

Jugé: Que lorsque la cause d'action a originé dans le Bas-Canada, un writ *ad respondendum* émané en vertu des dispositions de la 63ème section des Statuts Refondus du Bas Canada, chapitre 83, pour être signifié dans le Haut Canada, est correctement adressé, et peut être valablement

servi dans le Haut Canada, par une personne lettrée, quoique seulement adressé, "A tous et chacun les huissiers de la Cour Supérieure pour le Bas-Canada, appointés pour le district de Québec." (1)

The Plaintiff, by his action, demanded payment of the sum of $248.30, for the amount of Defendant's promissory note, made at Quebec, and payable to Plaintiff's order, at the Quebec Bank, in Quebec, together with the costs of protest. The ordinary writ of summons *ad respondendum* was sued out, addressed "To all and every the bailiffs of the Superior Court for Lower Canada, appointed for the District of Quebec," and contain the usual command to summon, within the limits of the District of Quebec, the Defendant who, in the said writ, was described as of Belleville, in Upper Canada, to appear in the said District, and was endorsed over the signature of the prothonotary with the words: "This writ may be served in Upper Canada." The writ and declaration, as appeared by the return, were served, not by any bailiff of this Court, but, by a litterate person in Belleville, and the service was sworn to before a commissioner authorized to receive affidavits to be used in the Superior Court for Lower Canada. After the return of the writ into Court, in this District, the Defendant appeared and filed an *exception à la forme*, containing the following grounds: Because the process was addressed "To all and every the bailiffs, &c.," and was not served by any of the persons to whom it was so addressed; because it commanded the bailiffs appointed for the District of Quebec, within such District, to summon the Defendant to appear before the Superior Court, on the sixteenth day of December, instant, and did not command them to cite the Defendant beyond the limits of such district; because the Defendant, by process which only authorized the service thereof to be made upon him within the said District of Quebec, was served beyond such limits, in Upper Canada; because Donald Moodie, who served the process, was not a bailiff having a right so to do; because the process could not be served in Upper Canada, nor beyond the District of Quebec; because no process has issued ordering the Defendant to be summoned in Upper Canada, and to appear in the District of Quebec; the Defendant, at the argument, urged the grounds of exception above stated. The Plaintiff, in reply, referred to the provisions of the Statute under which the process had issued, which are in substance as follows: "In any suit or action brought or to be brought against any person who shall have left his domicile in Lower Canada, or against any person who has had no domicile in Lower Canada, but when such person has

(1) V. art. 48 et 69 C. P. C.

personal or real property therein, or the cause of such suit or action has arisen within Lower Canada; then, if such person is a resident of or is known to be then in Upper Canada, any judge of the Superior Court, or the prothonotary of the Superior Court, or clerk of the Circuit Court at the place where the action is brought, on being satisfied of the facts by affidavit or otherwise, may sign an order to be indorsed on the writ of summons in such suit or action, in the following words: "This writ may be served in Upper Canada." Such writ may then be served in Upper Canada by any bailiff entitled to serve process of the County Court of the county in which the service is made, or by any literate person, and the affidavit of such bailiff or of such literate person, made before some commissioner authorized to receive affidavits to be used in the Superior Court or Circuit Court for Lower Canada, or any justice of the peace for the county in which the service is made, shall be evidence of the service, and the person so served shall be bound to appear according to the exigency of the writ, and if he fails so to appear, the Plaintiff may proceed as in case of default, and as if the service had been made within the limits of the ordinary jurisdiction of the court."

JUDGMENT: "The court, considering that the *exception à la forme* is not founded in law, doth dismiss the exception. (13 *D. T. B. C.*, p. 235.)

AUSTIN, F. W. G., for Plaintiff.

CASAULT, LANGLOIS and ANGERS, for Defendant.

CHARGES DU MARIAGE.

CIRCUIT COUR, Montreal, 27th February, 1863.

Before MONK, Justice.

ST AMAND, *et al.*, *vs.* BOURRETT, *et ux.*

Jugé: Que lorsque des épiceries ont été achetées par un mari, séparé de biens d'avec sa femme, un jugement sera rendu contre le mari et la femme solidairement, sur preuve que les effets ont été consommés au domicile commun, tels effets étant des effets de nécessité. (1)

MONK, Justice: This action is brought against a husband and wife, separated as to property, for groceries, and a joint and several condemnation is prayed for. It would appear the wife did not personally buy any of the goods, but that they were all bought by the husband and entered in a pass book. It is shewn however that they were necessaries and were used in their common domicile, for the support of the family, and

(1) V. art. 1423 C. C.

this being the case, a joint and several condemnation must be given against them. (13 *D. T. B. C.*, p 238 et 7 *J.*, p 32.)

NORMANDEAU, for Plaintiffs.

MOUSSEAU and LABELLE, for Defendants.

BILLET SANS CONSIDERATION.—VENTE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1 december, 1862.

Before: AYLWIN, DUVAL, MEREDITH and MONDELET Justices.

GAMSBY, et al. Appellants *and* CHAPMAN, Respondent.

Le Demandeur vendit et livra au Défendeur une quantité de bois de pin qui fut payée partie comptant, et la balance par le billet du Défendeur, pour le montant duquel l'action fut portée. Le billet portait à sa face que "la valeur reçue était reconnue pourvu que le bois ne fût pas réclamé." Le bois fut subséquemment réclamé par la Compagnie des Terres de l'Amérique du Nord, comme ayant été coupé sur ses terres, et à laquelle le défendeur donna son billet pour un montant excédant le montant du billet donné au Demandeur. Dans une action par les Demandeurs sur le billet à eux donné:

Jugé: Que, dans l'espèce, un plaidoyer de non considération et de compensation constituait une bonne défense, quoique le billet ainsi donné à la Compagnie, n'eût pas été payé, et quoique les Demandeurs n'eussent pas été informés qu'il eût été donné, et qu'ils n'eussent pas été appelés en garantie dans l'action en revendication, qui avait été renvoyée pour défaut de forme un an après la saisie.

MONDELET, Justice, *dissenting:* The judgment which is the subject of the present appeal was rendered by the Superior Court, at Sherbrooke, (SHORT, Justice,) on the 18th March, 1861, dismissing Plaintiff's action. The judgment not being *motivé*, there is no means of knowing, except from what may be gathered from the record and the cases filed, the points which may or may not have engaged the attention of the Court below. The action was brought by Appellants, for the recovery of £78.12.6, with interest, as the balance due them, on the sale and delivery by them to Respondent, of 292 pieces of Pine Lumber, containing 78,277 feet, board measure, for which balance Defendant gave his promissory note. The defence is, that the note in question was given without consideration, and that, subsequently to the date thereof, the 292 pieces of lumber were attached by the British American Land Company, in an action of revendication, and a claim of £90, for stumpage, against Gamsby, one of Appellants and one of Plaintiffs in the Court below, and that Defendant, in order to release the logs from seizure, paid the British American Land Company the sum of £90, for which sum Defendant prays a set off against Plaintiff's demand. A special answer

was put in by Plaintiffs, wherein they set forth that the note was given for value received, by the 292 pieces of lumber; that the lumber was not cut on the company's lands, and that the company was not entitled to any stumpage; that the action of the company against Gamsby was dismissed upon an *exception à la forme*, and was not brought again; that the pretended claim of the British American Land Company was never made available against the lumber, and that Defendant Chapman had no authority or consent from Plaintiffs, or either of them, to pay the British American Land Company any sum of money on account of the pretended claim for stumpage. The parties having gone to *enquête*, Defendants have not in any wise made out any of the allegations contained in their plea. On the contrary, from the record and evidence, it is made out that Defendant acknowledged that Plaintiffs delivered him 292 pieces of pine lumber, containing 78,277 feet, and for that Defendant gave his note for £74.12.6, with interest thereon; the lumber was then marked with Defendant's brand and his initials. In the action *en revendication* for the logs, they were not identified, since it was dismissed upon an *exception à la forme*, which was never instituted again. The payment which Chapman claims having made to the British American Land Company, was so made by him without any authority whatsoever, or without having been legally constrained to make such payment, it was made as follows: "Edward Chapman, bought of British American Land Company, "the right of said company to the stumpage of 84,468 feet of "pine Lumber, cut by Royal Gamsby, in the Township of "Bury, last winter, more or less, for the sum of £90, but "without releasing said Gamsby from his liability to damages "to the company, for the trespass committed by him. The "logs being in the Saint Francis River, at Chapman's risk, "Sherbrooke, 11th May, 1855. Settled by note at 3 months. "(Signed) J. G. ROBERTSON, for Commissioner." I do not know, nor can I understand, upon what principle the action of Plaintiffs was dismissed in the Court below. The Respondent appears to sustain the correctness of that decision, as being an equitable one, I see no more equity than strict law in the decision of the Court below. I am therefore of opinion that the judgment which is appealed from should be reversed, and Defendant condemned to pay Plaintiffs the amount he owes, with interest, and costs in both Courts. The judgment therefore should be for £74.12.6, with interest thereon from 12th March, 1855, being the date of the promissory note.

MEREDITH, Justice: Royal Gamsby, one of Plaintiffs in the Court below, appears to have cut, during the winter 1854-1855, a considerable quantity of timber on certain lots of land

in the township of Bury, belonging to the British American Land Company. The timber so cut was, in the month of March, 1855, sold by the Appellants to the Respondent for £151.3.6, on account of which he paid in cash £77.1.3, and for the balance he gave Appellants a promissory note for £74. 12.6, payable," contingent upon no claims being made to the logs." Claims to the logs were made by the British American Land Company, to satisfy which Respondent agreed to pay that company £90. The company have taken his note in payment of that sum and Respondent contended in the court below, that the sum which he had so been under the necessity of paying to the company ought, so far as necessary, to be set off against Plaintiff's claim upon the said note for £74. 12.6; and this pretension was maintained in the court below. The Appellants contend that Respondent has failed to show that the timber was cut upon the company's lands, but, upon this point, I think the proof is against Appellants. The Appellants also contend that the rate of stumpage paid by Respondent was too high; but Appellants cut the timber without, so far as we see any color of right. They were, therefore, liable to be treated as trespassers, and had no right to expect to get the timber at the rates usually charged by the company to persons obtaining licenses to cut timber on its lands. Robertson says: " The reason of the high charge made by the company originally against *Plaintiffs was, that the timber was cut on the company's lands in Bury, without a license*, and without their knowledge and consent, being about double the usual rates in cases where a license was granted. This was the usual charge made by the company when they settled with trespassers." And, in this mode of dealing with trespassers, I can see nothing unreasonable. The Appelants also contend that Respondent's plea ought not to have been maintained because it does not appear that Respondent has paid the £90 for which he settled with the said company. But, as Respondent has contracted a liability to the extent of £90, in order to retain the said timber, by discharging claims upon it for which Appellants were liable, they cannot enforce their claim against him until they have caused him to be discharged from the liability which he was so compelled to assume. The judgment of the court below meets, according to my view, the justice of the case: and no sufficient cause has, I think, been shewn to induce us to disturb it.

DUVAL, Justice: The pretention of Appellants is, that they should have been called in as *garants* in the action brought by the Land Company to revendicate the lumber. No doubt they might have been made *garants;* but Defendant was not bound to call them in. He only assumed the *onus* on himself

of shewing that the logs did belong to the company, and that he was right in settling that action. This has been done, and it is clear that neither the action nor the appeal should have been brought.

Judgment of the court below confirmed. (13 *D. T. B. C.*, p. 239.)

FELTON and GRIFFITH, for Appellants.

RITCHIE and BORLASE, for Respondent.

CONTESTATION D'OPPOSITION ET DE COLLOCATION.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 5 mars 1863.

Refore: AYLWIN, DUVAL, MEREDITH, MONDELET, and BADGLEY, Justices.

DOUTNEY, Appellant, *and* MULLIN, Respondent.

Jugé: 1° Qu'en préparant un rapport de distribution, le protonotaire est tenu de regarder les allégations d'une opposition non contestée comme vraies, et de préparer son rapport en conséquence; lequel rapport doit être contesté dans le cas où le protonotaire commettrait une erreur en colloquant les parties; si le rapport est erroné en raison de faits non fondés allégués dans l'opposition, l'opposition doit être contestée.

2° Que, dans l'espèce, la cour ne prendra pas en considération l'erreur quant à la forme de la contestation du rapport au lieu d'une contestation de l'opposition, en autant que les parties ont traité la contestation du rapport, de même que si l'opposition eût été contestée, et produit leurs preuves en conséquence; et en autant que les allégations de la contestation telle que faite, n'étaient pas prouvées.

This appeal was instituted from a judgment of the Superior Court of the 30th April, 1861, dismissing the contestation, by Appellant, of the report of distribution prepared on the 15th October, 1860, in respect of the collocation No 7, whereby Respondent, James E. Mullin, was collocated for £400, the amount of an obligation of the 5th, enregistered the 7th September, 1857, containing a special mortgage of the lot No. 2, sold as belonging to Henry Deery, the Defendant. The Appellant was also an hypothecary creditor of Deery, under an obligation for £750 of the 12th, enregistered the 13th November, 1858, mortgaging the same lot No 2. The moyens of contestation alleged that the obligation for £400, claimed under by Mullin, was given by Deery without any consideration or value, and merely for the purpose of creating in favor of Respondent an hypothec on the property sold in the cause, which had been previously secured by hypothec on other property belonging to Defendant, and which had been paid by the judgment of distribution rendered in the cause No. 1831, wherein Mullin was Plaintiff, and Deery Defendant.

By his conclusions Appellant prayed that the report of distribution be revised and altered, and that he be collocated and paid in preference to Mullin the sum of £452 10s. 10d., for which Mullin had been collocated in the report of distribution. The Superior Court (M. Justice BERTHELOT, presiding) rendered the following judgment: "La Cour, adjugeant au mérite, et considérant que William L. Doutney, n'a pas prouvé les allégations de sa contestation à l'encontre de la collocation, et qu'il n'y a pas de contestation de l'opposition de Mullin, ni de conclusion à la réduction de l'obligation du 5 septembre 1857, sur laquelle elle est fondée a debouté la contestation avec dépens, et ordonne que le montant de la collocation no. 7 soit payé par le shérif de ce district, tel et ainsi que mentionné au projet de jugement de distribution, savoir: 7° To James E. Mullin, amount of his claim founded on a deed of obligation in his favor by Defendant, executed before SMITH, and colleague, notaries, at Montreal, bearing date the 5th day of September, 1857, and registered on the 7th September, 1857, containing a special mortgage on the lot no. 2, sold in this cause, £400 0 0 interest thereon from the 5th October, 1858, to the 11th September, 1860, £48 7 6, costs of opposition to M. Doherty, Esquire, £3 11 8, to the prothonotary 11 8. Les sommes ci-dessus distribuées formant un total de £452 10 10. La Cour ordonne au Demandeur, Doutney, l'adjudicataire du lot no 2, vendu en cette cause, de payer immédiatement entre les mains du shérif de ce district de Montréal, le montant par lui retenu entre ses mains comme tel adjudicataire, ou autant d'icelui qu'il sera nécessaire pour satisfaire le montant ci-dessus distribué, et sur ce le shérif sera tenu de payer aux personnes susdites les différentes sommes pour lesquelles elles ont été respectivement colloquées, et en ce faisant il sera légalement déchargé."

AYLWIN, Justice, *dissenting*, was of opinion that there should have been a contestation of the opposition, but that the judgment went too far in homologating the judgment of distribution and ordering the *adjudicataire* to pay or to give security. The judgment was premature. An opportunity should have been afforded Plaintiff to contest the opposition. He would reverse part of the judgment, each party paying his own costs.

MEREDITH, Justice: The contestation of Appellant is, not only in name, but as to its conclusions, a contestation merely of the report of distribution, whereas, according to the practice of our Courts, which in this respect appears to me to be perfectly reasonable, the contestation ought to have been to the opposition. The prothonotary, in preparing a report of distribution, assumes that the allegations contained in the

uncontested oppositions are true, and frames the report according to the rights of the parties, as alleged in their respective oppositions. If the prothonotary make any error in collocoting the parties in the report, a contestation of that report is the mode for obtaining redress; but, if the report be wrong, not in consequence of any error in the preparation of it, but in consequence of unfounded statements of fact in any opposition upon which the report is founded, then the contestation ought to be, not of the report, which was properly prepared, but of the unfounded opposition upon which the collocation complained of is based. In the present case, Opposant Doutney contends that the consideration mentioned in the deed upon which the opposition of Mullin is founded, was not received by Defendant Deery; and that the allegation, in Doutney's opposition, that a certain sum of money is due to him, under that deed, is untrue; aud such being Doutney's pretensions, he ought, plainly, to have contested Mullin's opposition, containing the allegations alleged to be untrue. But, as both the parties have treated the contestation as if it were a contestation of the opposition, and have adduced the same evidence that they would have adduced had the contestation been a contestation of the opposition, as it ought to have been, it seems to me that we may overlook the objection as to form, and dispose of the case upon the merits; and, assuming that this course is to be adopted, I may observe, that, at the date of the Respondent's mortgage, upon which he is collocated, namely on the 5th of September, 1857, the balance due to him by Defendant was £863 2 1. On account of which the Respondent had previously received three mortgages amounting to £700 0 0, leaving an uncovered balance £163 2 1, due to the Respondent. The mortgage in favour of the Respondent dated the 5th of September, 1857, is for £400 0 0, but within two months after the date of that mortgage, and more than a year before the date of Appellant's mortgage, Respondent made advances to Defendant in money and goods, more than sufficient to make up the consideration money of £400 0 0, for which the last mentioned mortgage was given. There can be no doubt that a valid hypothec may be granted for future advances; (1) and the weight of authority is in favor of this opinion, that the making of such future advances need not be proved by authentic instruments. (2) The authorities however are very conflicting upon the question

(1) 2 Troplong, Priv., et Hyp., Nos. 477 to 480; 2 Pardessus, Droit Com., pp. 28, 555, Nos. 156, 474; 1 Persil, Priv., et Hyp., p. 164; 2 Battur, p. 179; 6 Toullier p. 578, in note.

(2) 2 Troplong, Priv., et Hyp., Nos. 508-509; 8 Merlin, Questions de Droit, vbo. Hyp., Sec. III, p. 87.

whether a creditor, under a hypothec, granted to secure future advances, ought to be collocated according to the date of the deed, or according to the date of the advances; but, upon that point, which is one of very great importance, and by no means free from difficulty, it is unnecessary to express an opinion in this case, because all the advances made by Respondent bear date long before the hypothec of Appellant. Indeed, from the factum of Appellant, it does not seem that any question is intended to be raised as to these points. It is however contended by Appellant: "That, as the mortgage on "the face of it appears to have been given for money lent at "the passing of it, and not as a security for moneys or goods "to be thereafter advanced; that. under the most favorable "construction, it could only hold for what Deery owed to "Mullin, at the time of the passing of the deed." But this pretension cannot be maintained, for the evidence, at the same time that it shews that the consideration mentioned in the mortgage was not given, also establishes that another consideration equally good was given; and the difference between the consideration acknowledged, and the consideration actually given, the two being equally good, is in law immaterial. If a mortgagor acknowledged the receipt of the consideration in gold, and that it was proved to have been received in silver, it could not be contended that the mortgage would be invalid; and yet the case supposed, and the case before us are in principle the same. The Defendant, at the date of the obligation in question, appears to have required advances to the amount of £400, to carry on his trade, for which he gave a hypothec; the Defendant did obtain from Respondent advances to the extent agreed upon, and to his satisfaction, in consideration of the said hypothec. It is true the advances actually furnished were not exactly of the description mentioned in the obligation, nor were they given exactly at the date specified. But the advances furnished were equivalent in value to the consideration to which Defendant was entitled under the obligation. The change was made with the consent of Defendant, and did not prejudice his creditors, and, therefore, ought not to have the effect of defeating the hypothec. The matter reduces itself to this; under the obligation Defendant was entitled to a sum of money at once, instead of taking the money at once he waited a short time and of his own free will, so far as we can see, took goods in lieu of it. It does not appear, nor is there any reason to presume, and, indeed, it is not alleged, that the change in the consideration of the hypothec injured either Defendant or his creditors; and, therefore, I think that neither he, nor they, ought to be allowed to make it a ground

for impugning the hypothec of Respondent. The law on this subject is very well explained by Toullier, Vol. 6, Nos. 175, 176, 177, and, at No. 176, the author says : " S'il n'est pas né- " cessaire d'exprimer dans l'acte la cause de l'obligation, on " doit en conclure que l'obligation est valable quoique la cause " exprimée soit fausse, pourvu qu'il existe une cause légitime. " C'est un point décidé par plusieurs arrêts de la Cour de cas- " sation ; " and, at No. 177, the author adds. " Mais s'il est " prouvé que la cause exprimée est fausse, le créancier doit " prouver que l'obligation a une autre cause honnête et légi- " time." This, according to my view, is what has been done in the present case ; and, therefore, I think that the judgment of the Superior Court may be confirmed, not only on the ground that there ought to have been a contestation of Respondent's opposition, but, also, on the ground that Respondent has failed to prove the allegations of his contestation even as made.

Judgment of the Superior Court confirmed. (13 *D. T. B. C.*, p. 245.)

DAY and DAY, for the Appellant.

DOHERTY, for the Respondent.

AFFRETEMENT.—CONNAISSEMENT.

QUEEN'S BENCH, APPEAL SIDE, Québec, 15 Juin 1863.

Present : AYLWIN, J., DUVAL, J., MEREDITH, J., and BERTHELOT, J.

MCCULLOCH, et al., Appellants, *and* HATFIELD, Respondent.

Jugé : 1° Que l'affréteur a le droit de revendiquer sa propriété contre le capitaine du vaisseau, qui, l'ayant prise à bord, refuse de signer un connaissement avant que de faire voile. (1)

2° Qne la saisie-revendication peut être pratiquée et l'action rapportée pour les dépens seulement, le connaissement ayant été signé après l'émanation du writ, mais avant son exécution.

A writ of *saisie-revendication* issued out of the Superior Court, at Quebec, at the suit of Plaintiffs, upon the affidavit of Plaintiff's agent, which set forth that, in the month of June, 1862, at the City of Montreal, and under an ordinary contract of affreightment, a quantity of flour had been shipped by Appellants, on board of a vessel of which Respondent was commander, in consideration of which shipment Respondent agreed to sign the usual bills of lading, before leaving port, that he would deliver the flour in Liverpool, England, to the order of Appellants ; that Respondent had afterwards left the

(1) V. art. 2420 et 2424 C. C.

port of Montreal and commenced his voyage with Appellant's flour on board of his vessel, without signing the usual bills of lading; the writ was executed at the port of Quebec, on the 7th June, and returned with the declaration on the 1st September following. The Respondent appeared and pleaded that, after the shipment of the flour, and before its attachment, he had duly signed the bills of lading which he had delivered to the agents of Appellants; that, since the shipment, he had conveyed the flour in question from Montreal to Liverpool, and had there well and truly delivered it to the order of Plaintiffs. In rendering judgment in the Court below; STUART, Justice, said: "The Defendant must succeed; the signing of the bills of lading took place before the execution of the writ of revendication, and the only question to be decided is one of costs; "can a judgment be given for costs alone?" I am of opinion that there must be a judgment for some part of the demand, or else costs cannot be granted." The judgment of the Court below is as follows: "The Court, considering that Defendant hath well and sufficiently established in evidence the material allegations of his plea of perpetual peremptory exception, and, more particularly, that, after the issuing of the writ of revendication aud before its execution, Plaintiffs accepted from Defendant bills of lading for the flour mentioned in the writ of revendication, and Plaintiffs have since received delivery of the same at Liverpool, in England. Considering that, after the receipt by Plaintiffs of the bills of lading, there were no cause of action against Defendant, and that there was a settlement of the cause of action; doth maintain the plea and dismiss Plaintiff's action, with costs." It was from this judgment that the Plaintiffs instituted an appeal.

AYLWIN, J., *dissentiens*: This is an appeal from a judgment rendered by the Superior Court at Quebec, on the 5th of December, 1862, dismissing an action of revendication brought by Appellant to recover possession of 1,500 barrels of flour. The Appellants are merchants in Montreal, and Respondent is the master of a sea-going vessel called the "General Williams." It appears of record that Appellants, on or about the 30th of May, 1862, under a contract of affreightment with Respondent, shipped on board the "General Williams" 1,500 barrels of flour, to be carried on board of that vessel from the port of Montreal to Liverpool, in England, and there delivered to Appellants' order. After the shipment, some difficulty arose respecting the terms of the bills of lading. Appellants required Defendant to acknowledge that the flour had been shipped "in good order and condition;" but this Respondent refused to do, on the plea that the barrels containing the flour were

not in good order. The "General Williams" left Montreal, and whilst she was in the harbour of Quebec, a negotiation was conducted by Mr. Holt, one of Appellants' attorneys on behalf of Appellants, and Respondent, assisted by Mr. Tibbits, the ship's agent at Quebec, which ended in Respondent signing and delivering, under protest, to Appellants' agent, bills of lading to their satisfaction, for the flour in question. Those bills of lading were signed and delivered on the 6th of June, 1863, *and, on the following day*, an attachment *en revendication* was made of the 1500 barrels of flour. The attachment was effected in consequence of a refusal on the part of Respondent to pay a sum of $43 as and for costs of suit claimed by Appellants. The writ having been returned into Court, Appellants called on Respondent to plead to this action of revendication. Respondent pleaded: "That, after the shipment "of the flour, and before the attachment thereof, Defendant, "as the master of the vessel called the *General Williams*, did "well and duly acknowledge, in the usual and accustomed "form, the shipment of the flour in and on board of the vessel, "to be carried for freight and reward, in that behalf to be paid, "to the port of Liverpool, in England, and there to be delivered "unto Plaintiff's order, and did, before the attachment, well "and duly deliver his acknowledgments in writing, commonly "called bills of lading, to Plaintiffs. That, since the shipment, "he hath carried and conveyed, in and on board of his said "vessel, from the port of Montreal, to the port of Liverpool, "the fifteen hundred barrels of flour, and the flour he hath "well and duly delivered at the port of Liverpool, unto the "order of Plaintiffs." The whole contestation is as to the costs of the suit. The parties gave the following admissions: "It is admitted that Plaintiffs shipped on board the 'General Williams,' whereof Defendant was and is master, fifteen hundred barrels of flour, to be conveyed from the port of Montreal to Liverpool, and there to be delivered to Plaintiffs' order: 'That such shipment took place at the time and place mentioned in Plaintiffs' declaration; that it is the usage and custom of trade in the province for masters of vessels to sign bills of lading for cargo shipped, on request of shipper, before the vessel leaves port: 'That since the bringing of this suit, the flour hath been delivered at Liverpool, pursuant to Plaintiffs' order, less six barrels, for which Defendant paid." The case resolves itself to the question, whether the award of costs in favour of Respondent be correct. To determine this, it is necessary to ascertain whether the attachment effected of the 1500 barrels of flour, was legal, and whether on the 7th of June, Appellants had a right to revendicate. Their allegation was in the words of their declaration, "that Defendant, as

" such master, is now about to carry off the said goods and " merchandizes in the said vessel, without signing bills of lad- " ing for the same, by means whereof, without the benefit of " a writ of revendication, to attach the said 1500 barrels of " flour, Plaintiffs may lose their said property or sustain " damage." This allegation is met at the very outset with the fact that, on the 6th June, Respondent "had signed bills of lading for the same, that the same were in the possession of Appellants, and, in consequence of the liability of Respondent, as such signer of the bills of lading, were liable to indorsement, to any other party, there to be well and truly delivered at the said port of Liverpool, and to the order of Plaintiffs." The revendication then, if legal, would have the effect to make Respondent answerable for the flour, at Quebec, where judgment was rendered, instead of Liverpool, according to the terms of the bills of lading. By the acceptance of the bills of lading, the Revendication became impossible, being inconsistent with the terms of the contract of the affreightment entered into with Appellants. By this contract, Respondent was bound to convey the flour to Liverpool, but Appellant, on his side, was bound to allow the shipment to be affected, and hence no attachment could issue which must interfere with the voyage. Admitting that Respondent was bound to pay the costs of the suit, on the 7th June, the writ of revendication should never have been executed, the right and the remedy being merged, by the acceptance of the bills of lading. Though the writ of revendication ceased, the writ of summons would still subsist, and would entitle Appellant to obtain judgment for the costs, in the usual course of an ordinary suit. Again, Respondent by his *exception péremptoire* has set up the bills of lading and the delivery of the flour at Liverpool, unto the order of Appellants. Appellants, instead of admitting the facts alleged in the plea, and answering it specially, that the costs were unpaid, and that formed the only contestation, on the contrary, denied the facts alleged in the exception. The evidence then being clearly in favour of Respondent and admitted by all parties the costs should have been awarded against Appellants, even supposing that there was a settlement of the cause of action as contended for by them, save and except the cost up to the day of the plea pleaded by the exception, but with costs subsequently, the costs of the revendication being borne by Appellant. The revendication was a high-handed measure which deserved to be reprobated. The judgment of the Court below was to the effect that there was no settlement of the cause of action as contended for by Appellants. This is a question of fact of considerable nicety: in such a case, I would not un-

dertake to alter the judgment, there being much to be said on both sides. I concur in the view which was entertained by the Honorable Judge of the Court below in the entire, and I have therefore to dissent from the judgment which this Court is now about to render.

MEREDITH, J., in rendering judgment, said: Appellants, about the 30th May, 1862, at Montreal, under a contract of affreightment with Respondent, shipped on board of the "General Williams" of which Respondent was master, 1500 barrels of flour, to be carried on board of that vessel from Montreal to Liverpool and there delivered to Appellants' order. The flour was delivered on board of the "General Williams" by Toussaint Lecompte, who proves that, when delivering it, he told the mate of the ship to reject any that was in bad order; that none was rejected; that, after the flour had been received, bills of lading were demanded, two or three times, and were refused, on the ground that the barrels were in bad order. The loading of the 1500 barrels was completed on the third of June, and, one or two days afterwards, the "General Williams" sailed from Montreal with the flour belonging to Appellants on board and without bills of lading having been signed. The "General Williams" reached the Island of Orleans, on her voyage home, on the 6th of June, and, in the forenoon of that day, Appellants sued out a writ of *saisie revendication*, under which the flour was attached on the following day. In the interval, between the suing out of the writ and the execution thereof, and after much negotiation between the agents of Appellants on the one side, and Respondent on the other, the latter signed bills of lading in due form, under protest, for the flour in question; and the bills of lading, so signed, were transmitted to Appellants and retained by them. Unfortunately, a misunderstanding occurred as to the costs, in consequence of which the writ of *saisie revendication* was executed and the action returned into Court. As to the first cause of difference between the parties, no proof has been adduced by Respondent tending to contradict the evidence of Lecompte already alluded to, or to show that Respondent had any justification, or any reasonable excuse for refusing to sign, before he left port, the bills of lading which he afterwards signed in the course of his voyage; and, therefore, as to the original matter in dispute, Respondent must be regarded as the party in the wrong. Such being the facts of the case, the first question we have to determine is as to whether Appellants had a right to seize *revendiquer* their flour under the circumstances above mentioned. This question is one of great importance, and not so free from difficulty as may at first sight appear. The right claimed by Appellants might often be exercised so as to

cause great injustice; indeed, there are but few cases in which a captain of a ship going to sea would not rather submit to be wronged to some extent than to wait in harbour sufficiently long to allow a part of the cargo to be taken out of his ship, perhaps from the bottom of the hold, under a process of *saisie revendication*; and, late in the season, the delay incident to the execution of such a process might endanger the ship and cargo, and the lives of all on board. On the other hand, the shippers of goods would be placed in a false position, and left without anything like adequate protection, were the Courts to hold that masters of ships could carry off the goods intrusted to their care without delivering to the owners the customary bills of lading; such bills of lading being necessary, not only as receipts binding the master and the owners, but also as in effect giving the shippers the power of obtaining the immediate use of capital, if required, equal to the value of the property shipped. The authorities on this question are not so conclusive as might be expected upon a point which must have very frequently presented itself; but still, in a case such as the present, it appears to me, upon general principles, impossible to deny the right contended for by Appellants. The parties have expressly admitted." That it is the usage and custom of trade in this province, for masters of vessels to sign bills of lading for cargo shipped on request of shipper, before the vessel leaves port." The usage thus admitted is as binding upon the parties as if there had been an express agreement between them to the same effect; for whether a contract be in writing or verbal, all incidents annexed by law or by custom, are tacitly understood." *In contractibus tacitè veniunt ea quæ sunt moris et consuetudinis.*" Viewing then the contract of affreightment between the parties in this light it amounted to this: The shippers agreed to send 1500 barrels of flour on board of the " general William." The master of that ship, according to the admitted usage and custom of trade, was bound, before leaving port, to sign bills of lading on being requested so to do by the shippers. And, thereupon, the master was to convey the flour to the port of destination, and to deliver the same as agreed, upon payment of freight. Under this contract, the master, after he had been put *en demeure*, to sign bills of lading, had no right to carry to sea the flour belonging to shippers; and if he had no right to do this, then the shippers had a right to prevent their flour from being unlawfully carried off; and according to the laws of this province a *saisie revendication* is the usual remedy for the enforcing of a right such as that just mentioned. Our attention was drawn by the learned counsel for Respondent, to a passage in Abbott, on shipping, which is in these words: " If there is any dispute about the

quantity or condition of the goods, or if the contents of the casks or bales are unknown, the words of the bill of lading should be varied accordingly." Abbott, *English edition*, p. 333, *American edition*, p. 419. This authority appears to me to be perfectly reasonable; and cases frequently occur in our own trade in which I think the authority just cited ought to be acted upon; for instance, if upon the shipment of a large quantity of grain, a difference, involving a few bushels, were to occur as to the quantity shipped, I think it would be unreasonable on the part of the shipper to require the whole quantity shipped to be at once unloaded, in order to ascertain who was right; and if, in such case, the master were to offer a proper bill of lading for the quantity admitted, leaving it an open question as to the remainder, it may be well contended that a *saisie revendication* would not be justifiable. The case of *Gordon et al.*, vs. *Pollock*, 1 L. C. R., p. 313, (1) cited at the argument, seems, at least in some respects, to be one of the class of cases to which I have adverted; and although, at first sight, that case may appear to be in favor of Respondent, yet upon a careful consideration of the facts, I do not think that it will be found to militate against the view which I take of the present case. In *Gordon et al.*, vs. *Pollock*, the Plaintiffs alleged that they had shipped 457 barrels of flour on board of the bark *Jemima*, of which the Defendant was master. The master contended that he had received 437 barrels only, and tendered bills of lading for that quantity. According to the report it appears that " part only of the flour in question had been shipped at Montreal on board of the *Jemima*, and that the remainder had been sent to Quebec by the barge Scotland, described as a ship tender, to be delivered there on board of the said bark *Jemima*, from the freight of which vessel, however, the freight earned by the ship's tender Scotland, was to be deducted. The bills of lading relating to that portion of the flour were signed by Gilmour & Co., the owners of the barge, and contained the following undertaking: To be delivered on board of the *Jemima*, at the port of Quebec, or of any other vessel, to be pointed out by Thomas Gordon." It appears that the error, in relation to the 20 barrels missing,

(1) Dans le cas d'affrètement, le bâtiment est responsable pour la gabare dans laquelle les effets transportés sont mis du bâtiment, mais il n'en est pas responsable, lorsque la gabare est louée par l'affréteur pour transporter les effets au bâtiment qui est dans le courant. S'il survient quelque difficulté entre l'affréteur et le maître du bâtiment quant à la quantité des effets mis à bord et à la signature du connaissement que le maître refuse de signer suivant les prétentions de l'affréteur, ce dernier n'a pas le droit de revendiquer les effets chargés, mais il a une action contre le maître pour le forcer à signer le connaissement ou faire ordonner que, faute par lui de le signer, le jugement qui l'y condamnerait vaudrait signature. (*Gordon et al.*, vs. *Pollock*, C. B. R. Québec, 5 avril 1849. STUART J.-en-C., et BOWEN, J. 3 *R. J. R. Q.*, p. 17.)

had taken place on board of the bark Scotland. and that these 20 barrels never reached the *Jemima;* so (according to the report) ran the bulk of the evidence. As I view the case of *Gordon et al.*, vs. *Pollock*, the Plaintiffs were altogether in the wrong. The Defendant had received but 437 barrels of flour; and the Plaintiffs, in violation of the contract of affreightment, seized their flour, because the Defendant would not sign bills of lading for 20 barrels of flour more than he had received. The judgment of the court, which is given at full length in the report, decides that, under the circumstances above stated, the Plaintiffs had no right to seize their flour by process of *saisie revendication;* but the judgment does not appear to me to establish any thing beyond this. The learned counsel for Respondent also drew our attention to an authority from Valin, as indicating the course which Appellants ought to have followed in the present case. That passage, as cited in *Gordon et al.*, vs. *Pollock*, is in the following words: *Le refus du maître de signer le connaissement ne pouvant qu'être injuste, il y aurait action contre lui pour l'obliger de signer les connaissements, et pour faire ordonner que, faute par lui de signer, le jugement qui l'y condamnerait vaudrait signature.* The other writers on this subject seem to agree with Valin as to the course usually adopted in France by the shippers of goods when the masters refused to sign a bill of lading. But the authorities, at the same time that they shew that, in France, in cases such as the present, shippers obtained redress by suit, without seizure of the property shipped, further establish that the shipper had an undoubted right to prevent the vessel containing his goods from leaving the port until bills of lading were signed, or an equivalent therefor given to the shipper. Emérigon, *Traité des assurances*, vol. 1, p. 312, says: *Si les chargeurs laissent partir le navire sans avoir fait signer le connaissement ils doivent l'imputer à leur négligence.*" And Boulay Paty, *Cours de droit comm.* vol. 2, p 204, lays down the same doctrine in the same words. The foregoing authorities which are in accordance with the general principles of our laws, establish that, in the case before us, Appellants had a right to prevent Respondent from taking their goods to sea until he had signed the usual bill of lading. According to our law, the usual mode of enforcing a right such as that last mentioned is by *saisie revendication.* In France, it seems that the same object was obtained by a proceeding less rigorous and less expensive, but, in this country, it is impossible to obtain redress in the way in which it was afforded in France, as our laws do not admit of summary proceedings in such matters. And such being the case, I am of opinion that Appellants had a right to avail themselves of the ordinary process of law, namely, a

saisie revendication, to prevent the unlawful carrying away of their property by Respondent. Moreover, it may be observed, that, although a judgment such as spoken of by Valin would be equivalent to a bill of lading as a receipt, certainly it would not be equivalent to a bill of lading viewed as a negotiable instrument representing the property shipped. Indeed, a judgment would be useless, comparatively speaking, for some of the most important purposes for which a bill of lading is generally required; and to compel a party to adopt a proceeding which could not possibly give a remedy commensurate with the wrong complained of, whilst full justice could be done under another form of proceeding, would be, in effect, a denial of justice. The view which I take of the part of the case, now being considered, does not seem to be opposed to the judgment of the Superior Court, which is based on the sufficiency of the exception pleaded by Defendant, and not upon the ground that the declaration of Plaintiff did not disclose a good cause of action. If, then, as I think the action of Appellants was rightly instituted, they are entitled to their costs, unless the costs were waived by them, as Respondent contends. Upon this point, I am, I may at once say, against Respondent. The *onus probandi* was upon him; and, to say the least, there is not a preponderance of evidence in his favor. And here it is deserving of remark that Respondent, when he pleaded to this action, does not seem to have been under the impression that Appellants had given up their claim to costs: because, although at the enquête, an attempt was made to prove that Appellants agreed to waive their costs, no such waiver is alleged in Defendant's exception. It now remains only for me to say a few words as to the right of Appellants to return the action for their costs; and, as to this point, I cannot say that I entertain any serious doubt. The costs, it is true, do not form any part of the original cause of action; but they form a part of Plaintiff's demand; and I cannot see any reason for saying that Appellants had not as much right to a judgment upon the part of their demand as upon any other portion of it. The Superior Court, at Quebec, in the case *Darche* vs. *Dubuc*, (2 *R. J. R. Q.*, page 470,) expressly maintained that a Plaintiff may return his action for the costs only. (1) This judgment was in conformity to a judgment rendered by a majority of the Court of Queen's Bench, Sir J. STUART dis., in the year 1847, in the case of

(1) Lorsque le montant d'une poursuite est réglé, et que le Demandeur promet de ne pas rapporter son action, pourvu que les frais soient payés, il pourra la rapporter, si, le jour fixé pour le rapport, les frais ne sont pas encore payés. (*Darche et al.* vs. *Dubuc*, et *Dubuc*, opp., C. S., Québec, 28 avril, 1851 BOWEN, J. en C., et MEREDITH J., 2 *R. J. R. Q.*, p. 470.)

Dubord vs. *Labranche*, (2 *R. J. R. Q.*, p. 471.) The same question recently came under the consideration of this Court, in the case of *Herbert dit Lecompte* and the *Fabrique of St. Jean;* and no one of the Judges, so far as I know, expressed even a doubt as to the right of a Plaintiff to return his action for costs. Upon the whole, therefore, I am of opinion that, under the circumstances of this case, Appellants had a right to sue out the writ of *saisie revendication* which issued therein; and, I am further of opinion that Respondent is liable for the costs accrued upon the suing out of the writ, that Appellants did not waive their right to their costs, and that they had a right to return their action so as to have a judgment for costs. The costs of the seizure however ought not to be allowed. It was made after the bills of lading had been given and accepted and was therefore unnecessary. As I mentioned at the argument, it would have been more regular if Appellants, in the return of this action, had discontinued their demand except as to the costs. But their omission to do so has not been the cause of any additional expenses whatever; because, in order to establish their claim to costs, they had to prove their demand as stated in their declaration, as is plain from the factum of Respondent. The real controversy between the parties was as to whether Appellants, under the circumstances of the present case, had a right to a *saisie revendication*, and as to whether they had a right to return their action for the costs only. And, holding as I do that they were right as to both these points, I think they are entitled to the costs necessarily incurred by them in order to establish their rights. As I have already observed, the right contended for by Appellants, might, in many cases, be exercised so as to cause great injustice to the owners of ships; and it is obvious that all persons interested, either as owners or insurers, in the cargo of a vessel, might, by the delay incident to the seizure of a part of it, be subjected to great damage. Indeed, the interests of commerce, and therefore of the public generally, require that a vessel ready to go to sea, ought not unnecessarily to be detained in port. It therefore seems to me very questionable, whether the seizure of goods, shipped in usual course of trade, on board of a ship, and more particularly on board of a seagoing ship ought to be permitted, without the order of a judge; and also whether, in such a case, the judge ought not to be allowed, by the hearing of both parties, if the circumstances of the case admitted of it, or by the exacting of security, to guard against any unjust use of the rigorous process known in our law as a *saisie revendication*. If it be true that the shippers of goods, wrongfully carried away, ought to

have an adequate remedy, it is equally true, that ship owners and others, ought, as far as possible, to be protected against the unjust use of such a remedy. These points, however, are for the consideration of the Legislature, our duty as judges is to enforce the law as it exists.

Judgment was then recorded as follows: "The Court seeing that Appellants, on or about the thirtieth day of May, 1862, at the city of Montreal, under a contract of affreightment with Respondent, shipped, on board the ship called the "General Williams," of which Respondent then was master, fifteen hundred barrels of flour, to be carried on board that vessel from Montreal to Liverpool: Seeing also that it is admitted, that it is the usage and custom of trade in this province, for maters of vessels to sign bills of lading for cargoes shipped, on request of the shipper, before the vessel leaves port. Seeing that, after the shipment of the fifteen hundred barrels of flour, on board his ship, and before the vessel left the port of Montreal, Respondent was repeatedly requested to sign bills of lading for the fifteen hundred barrels of flour; and that Respondent, without having any lawful or reasonable cause or excuse for so doing, refused to sign the bills of lading, and also, that afterwards, to wit, on or about the fifth day of June, 1862, the General Williams sailed from the port of Montreal, under the command of Respondent, with the fifteen hundred barrels of flour on board, and without any bills of lading having been signed therefore; and considering that, after Respondent had been so requested to sign the bills of lading, and had refused to do so, he could not legally carry off to sea the fifteen hundred barrels of flour so belonging to Appellants; that, therefore, Appellants had a right to prevent him from so doing, and that, according to the laws of this province, Appellants were entitled to enforce their said right by the suing out of a writ of *saisie-revendication*, as was done in this case; and, considering that, although Respondent, after the suing out of the writ of *saisie-revendication*, delivered to Appellants bills of lading, in due form, for the fifteen hundred barrels of flour, thereby admitting the right of Appellants to have the bills of lading; and, although Appellants accepted the bills of lading; yet that the delivery and acceptance of the bills of lading, after the suing out of the writ of *saisie-revendication*, did not deprive Appellants of their right to recover, from Respondent, their costs incurred in suing out the writ; and, that Appellants, who are not proved to have waived their claim to the costs, had a right to return their action into Court, in order to obtain a judgment for the part of their demand by which they prayed for the costs; and, considering, therefore, that in the judgment of the court below,

in so far as it dismisses the demand of Appellants for their costs, and condemns them to pay costs to Respondent, there is error: doth, in consequence, reverse the judgment rendered in this cause by the Superior Court, at Quebec, on the fifth day of December, 1862; and, proceeding to render the judgment which the said court ought to have rendered, doth condemn Respondent to pay to Appellants their costs, in the court below, excepting the costs of the seizure of the flour, which seizure was unnecessary, after the delivery and acceptance of the bills of lading; and the court doth also condemn Respondent to pay to Appellants their costs in this court, &c. Dissentiente, the Hon. Mr. Justice AYLWIN. (13 *D. T. B. C.*, p. 321, et 7 *J.*, p. 229.)

HOLT and IRVINE, for Appellants.

VANNOVOUS, for Respondent.

CORPORATION MUNICIPALE.—APPROVISIONNEMENT D'EAU.

BANC DE LA REINE, EN APPEL, Québec, 12 décembre, 1862.

Présents: AYLWIN, DUVAL, MEREDITH, MONDELET et BERTHELOT, Juges.

FAILES Appelant, et LE MAIRE ET LES CITOYENS DE LA CITÉ DE QUÉBEC, Intimés.

Jugé: Que la Corporation de la Cité de Québec a le droit de recouvrer des citoyens un *quantum meruit*, ou la valeur de l'eau livrée, dans le cas où l'approvisionnement d'eau n'est pas suffisamment continu ou abondant pour les assujettir au paiement de la taxe de l'eau en entier.

L'appel était d'un jugement rendu par la Cour du Recorder de la cité de Québec, le 19 septembre, 1862. L'Appelant, propriétaire de deux maisons situées dans le quartier Montcalm de la cité de Québec, avait été poursuivi par la Corporation de Québec, pour $37.14, pour la taxe de l'eau sur ses deux propriétés, entre le 1er novembre, 1858, et le 30 avril, 1861. La défense était une dénégation générale, et que les Intimés n'avaient pas fourni aux maisons de l'Appelant l'eau de l'aqueduc de la manière exigée par la loi pour leur donner droit de réclamer de lui le paiement de la taxe de l'eau. Il fut établi à l'enquête que l'eau de l'aqueduc n'avait été fournie aux maisons en question que pendant un temps variant de une à deux heures par jour, et à des heures différentes, d'abord le matin et ensuite le soir; que, dans la plupart des autres quartiers de la cité, elle avait été fournie tous les jours pendant vingt-quatre heures, c'est-à-dire, d'une manière *abondante et continue*. Sur cette enquête, le Recorder rendit le

jugement interlocutoire qui suit: "Considérant qu'aux termes du statut 9 Victoria, ch. 113, sec. 11, les Demandeurs ont le pouvoir d'établir et fixer un taux ou prix pour fournir aux habitants de la cité de Québec, un approvisionnement continu et abondant d'eau pure et salubre: Considérant que, par le règlement du 26 juin, 1857, le conseil de la cité de Québec, conformément aux dispositions du statut 18 Victoria, ch. 36, a fixé la taxe ou prix annuel de l'eau pour les maisons occupées, à deux chelins dans le louis sur la valeur annuelle cotisée des maisons: Considérant, en fait, qu'il est prouvé que le Défendeur, pendant un espace de temps qui n'est pas déterminé par la preuve faite, n'a pas reçu des Demandeurs un approvisionnement continu et abondant d'eau, dans les maisons de lui, le dit Défendeur, mentionnées aux comptes, comme le veut le statut ci-dessus dernièrement cité: Considérant qu'il est également prouvé que les Demandeurs ont fourni pendant une période de temps qui n'est pas non plus déterminée par la preuve, telle que faite en cette cause, aux maisons du Défendeur un approvisionnement d'eau, chaque jour, pendant un temps variant d'après la preuve, de une à deux heures et demie, et à des heures différentes, la cour, *avant faire droit*, ordonne que l'enquête en cette cause soit ouverte de nouveau aux fins de constater: 1o. Pendant combien de temps le Défendeur a reçu comme susdit, un approvisionnement continu d'eau; 2o. l'époque à laquelle a commencé l'approvisionnement d'eau fourni chaque jour pendant certaines heures de la journée, comme il est dit ci-dessus, et la quantité et la valeur de l'eau ainsi fournie." Après une autre enquête le jugement final qui suit fut rendu: "Considérant que les Demandeurs ont failli de prouver avoir donné aux deux maisons du Défendeur situées dans le quartier Montcalm de cette cité de Québec, un approvisionnement continu et abondant d'eau, pendant la période de temps mentionnée aux comptes, savoir: du 1er novembre 1858, au 30 avril 1861, formant pour les deux maisons, 1825 jours; mais que les Demandeurs ont prouvé avoir fourni aux habitants du quartier Montcalm, pendant le dit temps, un approvisionnement d'eau estimé en moyenne à deux heures par jour, chaque jour, pendant la susdite période: considérant que le Défendeur, sous serment judiciaire, admet avoir reçu des Demandeurs, en moyenne chaque jour, pendant la dite période de temps, la quantité de trente-cinq gallons d'eau: considérant qu'il est établi que la barrique ordinaire d'eau ne contient que 30 gallons, et que l'eau prise à la rivière et amenée dans le quartier Montcalm est évaluée de 15 à 20 sols la barrique: considérant qu'en évaluant à une barrique par jour l'eau ainsi reçue par le Défendeur, ou à 12 sols par jour, ou même seulement à trois

sols par jour, on obtient pour résultat comme valeur de la dite eau, une somme excédant celle de $37.14 réclamée par les Demandeurs en cette cause, condamne le Défendeur à payer aux Demandeurs la dite somme de $37.14, avec intérêt du 17 août dernier, et les dépens."

C'est de ce jugement que le Défendeur interjeta appel.

LANGLOIS, pour l'Appelant: Cette cause présente à cette Cour la décision des trois questions suivantes: 1° L'approvisionnement d'eau que la corporation a fourni à l'appelant est il suffisant pour l'assujettir au paiement de la taxe de l'eau? 2° S'il est démontré que la Corporation n'a pas droit d'exiger de l'Appelant cette taxe, peut-elle réussir à obtenir de lui la valeur de l'eau qu'il a reçue? 3° Si elle a ce droit, comment cette valeur dans le cas particulier doit-elle être computée? L'acte de la 10me Victoria, chap. 113, qui a permis à la corporation de faire et conduire à Québec l'aqueduc, et d'endetter la cité pour cet objet à un montant considérable, définit comment l'approvisionnement d'eau devra être donné aux citoyens. La législature s'est servie des expressions "un approvisionnement abondant et continu d'eau pure et salubre." Ce n'est qu'à cette condition qu'elle a reçu le pouvoir d'imposer sur les citoyens la taxe de l'eau. La section 2, de la 18 Victoria, chap. 30, fixe le temps auquel la corporation aura droit de passer un règlement imposant la taxe de l'eau dans ces termes: "Qu'il sera loisible à la corporation, aussitôt qu'elle sera prête à fournir de l'eau à la cité, ou à aucune partie d'icelle, de spécifier et déclarer par un règlement que les propriétaires de maisons dans la cité, ou telle partie d'icelle dans laquelle elle est prête à fournir de l'eau, seront soumis à la taxe ou cotisation annuelle, laquelle taxe ou cotisation ne sera pas payable cependant avant que la corporation ne soit prête à fournir de l'eau aux propriétaires ou occupants." La 13 et 14 Victoria, chap. 100, sec. 1, contient des dispositions analogues; le seul changement apporté par la 18 Victoria consiste dans le taux de la taxe, qui, de £0 1 3 a été élevé à £0 2 0 dans le louis. En vertu de ces dispositions législatives, la corporation n'avait donc droit de passer les règlements produits en cette cause que lorsqu'elle serait prête à fournir un approvisionnement d'eau *abondant et continu*. Celui qui ne dure qu'une heure ou deux par jour est-il *continu?* Non. Est il abondant? Non. On prétendra peut-être que l'Appelant pour se sauver de payer la taxe de l'eau aurait dû s'abstenir de recevoir l'eau de l'aqueduc. Mais cette prétention tombe lorsque l'on considère que cette taxe, par la loi 13 et 14 Vic. chap. 100, sec. 2, est payable par tous les propriétaires et occupants de maisons, qu'ils consentent ou non à recevoir l'eau de l'aqueduc. D'ailleurs, comment pourrait-il constater et prouver que l'approvisionne-

ment n'a pas été abondant et continu ? Si la corporation n'a pas droit d'exiger de l'Appelant la taxe de l'eau, peut-elle surtout dans la présente cause, obtenir de l'Appelant un *quantum meruit ?* L'action des Intimés réclame la somme de $37.14, comme due en vertu *des règlements faits et pourvus par la corporation de Québec, et pour les causes et considérations mentionnées aux comptes y annexés.* Ces comptes chargent l'Appelant, comme débiteur de la corporation, en sa qualité de propriétaire de deux maisons, d'une taxe de 2s. dans le louis sur le montant de sa cotisation. Sur une action de cette nature, le recorder ne pouvait décider que cette seule question : l'Appelant est-il tenu ou non au paiement de la taxe de l'eau ? L'entreprise de l'aqueduc était d'une nature publique, et pour l'exécuter la corporation requérait la sanction de la législature. Cette dernière lui en a donné les pouvoirs, mais à la condition que les citoyens ne seraient tenus de payer l'approvisionnement d'eau que lorsqu'il serait *abondant et continu,* et qu'après l'observation de certaines formalités. c'est-à-dire, lorsque la corporation aurait passé pour cet objet un règlement dans les formes et de la manière voulue par l'acte d'incorporation, et que ce règlement aurait été approuvé par l'autorité exécutive de cette province. Ce sont des conditions suspensives, et, par conséquent, indivisibles, que la législature lui a imposées. Pothier, en son traité des Obligations, No 215 dit : " L'accomplissement des " conditions est indivisible, même quand ce qui fait l'objet de " la condition, est quelque chose de divisible." Pour exiger le paiement de l'eau, soit sous forme de taxe, soit autrement, la corporation doit donc se conformer en entier à ces conditions. Mais supposons un instant qne l'Appelant soit tenu de payer la valeur de l'eau qu'il a reçue ; comment doit être computée cette valeur ? Est-ce sur le prix de transport chargé par les porteurs d'eau ? Dans ce cas, il se trouverait, parce qu'il reste dans le quartier Montcalm, payer cette eau bien cher, tandis que ceux qui restent sur les bords de la rivière St. Charles ou du fleuve, et qui peuvent se procurer l'eau eux-mêmes, ne paieraient rien à la corporation, parce qu'elle ne pourrait pas établir quant à eux la valeur du transport d'une barrique d'eau. Il paierait plus cher que les citoyens demeurant à St. Roch ou à la Basse-Ville. Alors, si la corporation tient tant à l'eau qu'elle lui fournit, qu'elle abandonne la compulsion et le laisse libre de se pourvoir comme il l'avisera. Il creusera un puits sur son terrain, ou avec son cheval il ira quérir au fleuve ou à la rivière l'eau qui lui est nécessaire. Ce n'est donc pas de cette manière que cette valeur doit être établie.

BAILLARGÉ, pour les Intimés : Du jugement de la Cour Inférieure résultent trois propositions : 1° que l'Appelant doit payer la quantité de l'eau par lui reçue, sinon suivant le prix

porté aux comptes ou états, au moins suivant la valeur de cette eau. 2° que cette valeur ne doit pas être estimée relativement à la quantité d'eau fournie à d'autres parties de la cité, mais relativement à la quantité réellement reçue par l'Appelant. 3° que cette valeur, telle que prouvé dans la cause, excédant la somme réclamée par les Intimés, l'Appelant doit payer cette somme, c'est-à-dire $37.14. Ces propositions sont tellement évidentes qu'elles ne demandent aucun développement.

DUVAL, Justice: The judgment of this court being *motivé*, explains itself. We are not called upon by the pleadings to decide whether Defendant could be *compelled* to take the lesser quantity of water; on this we pronounce no opinion; but we decide that having willingly received the lesser quantity he must pay for the water so received for the use of his family. The judgment of the court below must therefore be maintained.

JUGEMENT: " The Court, considering that Appellant, Failes, by his answers given on the *serment judiciaire* in the Recorder's Court, admits that he received about thirty five gallons of water each day, during the period stated in the account filed by Respondents, and that it is not alleged in the pleadings of Appellant, or in the answers so given by him that the quantity of water so supplied to him by Respondents was insufficient for the use of his household. Seeing that, by the evidence adduced, the water so supplied is of a value far exceeding the sum of money awarded by the judgment from which the present appeal is brought: Considering that, by the premises, the Mayor, &c., have a right to claim from Appellant, Defendant in the Inferior Court, payment for the water so delivered to and accepted by him, and that the sum of money which Defendant has been condemned to pay, does not exceed, but, on the contrary, is less than the value of the quantity of water by him received, and that, therefore, in the judgment from which this appeal is instituted, pronounced by the Recorder's Court at Quebec, on the 19 September, 1861, there is no error; doth confirm the said judgment, etc. (13 *D. T. B. C.*, p. 335.)

CASAULT et LANGLOIS, pour l'Appellant.

BAILLARGÉ, pour les intimés.

CONTRAT DE MARIAGE.—INTERPRETATION.

QUEEN'S BENCH, APPEAL SIDE, Québec, 12 décembre 1862.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

BROWN, Appellant, *and* OAKMAN, et al., Respondents.

Jugé: 1° Que la clause dans un contrat de mariage par laquelle le futur époux donne à sa future épouse une somme d'argent pour par elle en jouir sa vie durante, et après son décès être partagée entre les enfants de leur futur mariage, crée une hypothèque sur les propriétés du futur époux qui donne aux enfants nés du dit mariage une préférence sur les créanciers subséquents de leur père; nonobstant une clause au contrat à l'effet que la donation était faite à la condition absolue que le futur époux aurait le droit de disposer, sans empêchement de la part de sa future épouse, d'aucune propriété sur laquelle elle pourrait avoir une hypothèque en raison de la dite clause, ou de l'aliéner ou de la vendre.

2° Que les hypothèques générales créées avant la passation de l'ordonnance des enregistrements, 4 Vic., chap. 30 affectent les propriétés acquises par le débiteur subséquemment à la passation de la dite ordonnance. (1)

On the 3rd January, 1842, Thomas W. Lloyd and Paul Lepper, became the purchasers of a certain brewery, and, thenceforward, continued to hold the same, each having an undivided half or moiety. The undivided half of Lepper having been sold under execution, Appellant, Brown, became an opposant, and, in his opposition, alleged that by a deed of obligation, executed before Austin and colleague, notaries, on the 1st of February, 1849, Lloyd and Lepper acknowledged themselves to be indebted to Brown in the sum of £500, and to secure the payment thereof hypothecated the proprety in question. The Respondents were also Opposants, and claimed to be paid £500 out of the undivided half of the brewery, in virtue of a contract of marriage entered into on the 30th July, 1831, between Paul Lepper and Eliza Atkins, his first wife. The stipulation in regard to the amount claimed is as follows: " And in view of the intended marriage, and, in consideration " as well of the foregoing agreements and renunciations, as of " the love and affection which he, the said Paul Lepper, enter- " tains for the said Eliza Atkins, he Lepper doth give, grant " and confirm unto the said Eliza Atkins, the sum of £500, to " be by her Eliza Atkins, enjoyed and possessed during her " natural life, and, after her death, the said sum of £500, to " go to, and be divided among the children, issue of the " intended marriage between Lepper and the said Eliza " Atkins; and, in case that there be no child or children of

(1) V. art. 2027 C. C.

" the intended marriage, living at the time of the decease of " Eliza Atkins, then the said sum of £500 shall and will " devolve unto the heirs and legal representatives of Lepper, " to be by them enjoyed and possessed in full property for " ever." The Respondents are the children, issue of the marriage between the late Eliza Atkins and the late Paul Lepper, and claim the £500, under the said contract of marriage, which was registered; and, having been entered into before the passage of the registry ordinance, it was alleged it affected all the property which Lepper possessed at the time of his marriage, as well as that which he thereafter acquired. The Appellant contested the opposition, and the parties having been heard, the Court below, on the sixteenth day of April, 1862, rendered the following judgment: "The Court: Consi- " dering that Paul Lepper, in and by his marriage contract " with Eliza Atkins, gave, granted, and confirmed unto her " the sum of five hundred pounds, to be by her enjoyed and " possessed during her natural life, and, at her death, the said " sum to go to, and be divided among the children, issue of " the intended marriage between Lepper and Eliza Atkins, " and, in case that there should be no child or children of the " intended marriage, living at the time of the decease of Eliza " Atkins, then the said sum should and would devolve unto " the heirs and legal representatives of Lepper, to be by them " enjoyed and possessed in full property for ever, and that " the foregoing stipulation and grant in the said marriage " contract, was, and is, a *douaire préfix* of five hundred pounds, " with the enjoyment in Eliza Atkins, and the property in " her children, as intended and defined by law; considering " that the condition attached to the grant, that Lepper should " and would have the right and power to alienate, sell and " dispose, without interruption from Eliza Atkins, of all and " every immoveable property, that he Lepper might become " possessed of, and upon which property Eliza Atkins might " have a mortgage for the said sum granted to her, did not, " and cannot be construed to authorize Eliza Atkins to bar " the rights of her children. Considering, moreover, that " Lepper did not sell, alienate, and dispose of the property " upon which attaches the mortgage of the children issue of " the said marriage, and that the controversy between Wil- " liam Brown and the said children is that of two mortgage " creditors, and that the date of mortgage must settle their " respective rights. Considering that the mortgage of the " children is long anterior to that of Brown, and that no act " of their's has barred or prejudiced their said right of mort- " gage, and considering that the plea of perpetual exception " of Brown to the opposition of Jane Oakman, in her said

" quality, and Eliza Lepper, Richard James Walsh, and Ar-
" thur Lepper, is wholly unfounded in fact and in law, the
" same is hence dismissed, with costs; and the opposition of
" Jane Oakman, *et al.*, maintained." It was from this judgment that Brown instituted an appeal.

PARKIN, for Appellant: It is established, as a matter of fact, and indeed it is not contested, that the real property in question was acquired by Lepper after his mariage with Eliza Atkins, and is subject to the operation of the clause in the contract of marriage above cited, and to all the rights and liabilities created by the same. It is therefore presented to this court as the sole question for consideration, what are the rights and liabilities created by the said clause? It is manifest that an estate is created in favor of Eliza Atkins, which is, the usufruct during her life, of the said sum of money; that another interest or estate is reserved in favor of Lepper, and a third estate or interest, which is only contingent, is created in favor of the heirs of Lepper, and it is the pretension of Appellant that this last interest could only vest in the heirs upon the supposition that Lepper did not avail himself of the reservation which he made of the power to alienate the property, and that no right or estate whatever was conveyed to Eliza Atkins, or the heirs of Lepper, except as secondary to the right expressly reserved by him to alienate the real property at his own will and pleasure. That the clause in question did not create a *douaire préfix* is manifest from the circumstance that the order of descent is particularly provided for and not left to the naked operation of law, thus violating the principle "*le douaire est le propre des enfants*," inasmuch, as under many circumstances which might be imagined to occur, the order of succession, under the stipulations of the said clause, might be different from what would occur in the case of a *douaire préfix*, and, in any case, parties taking the capital so secured would take it, not in virtue of the law, but in virtue of the stipulations of the contract. Under these circumstances, the Appellant contends that Lepper reserved to himself the full and free disposal of his property, and that the covenants of the said clause were only to take effect in favor of his wife and heirs in the event of his dying in the possession of the property, and leaving the same unencumbered. This will appear to be the contract between the parties, and by which they are all bound. But, it is contended that the power to alienate is not a power to mortgage, to this Appellant replies that a mortgage is truly an alienation and viewed by all the authors as such. Thus, neither a curator nor tutor has the power to sell or mortgage real property, and the formalities to be observed, in order to obtain the power

to do so, are similar, and only obtained for the same causes and after the exercise of the same judicial authority to confer such power; mortgage and alienation being treated in all respects as similar. In the second place, Appellant contends that, even if it were otherwise, the greater power includes the less, and the person in possession of his own property who has the power to alienate the same, which was the case in the present instance with Lepper, must necessarily be clothed with the power to partially alienate the same by mortgage.

MEREDITH, Justice: This case comes before the Court upon a contestation by Opposant, Brown, of an opposition filed by Respondents, as the children issue of the marriage of Paul Lepper with Eliza Atkins. The marriage contract between Lepper and Eliza Atkins bears date the 30th day of July, 1831, and was registered; and the claim of Respondents is for a sum of £500, payable to them under the marriage contract. The claim of Brown is based upon an hypothec in his favour bearing date the first day of February, 1849, also registered. And on the part of Brown, it is contended that he ought to be collocated under his hypothec, in preference to the claim of Respondents for the said sum of £500, so payable to them under the marriage contract. The controversy now to be determined by us turns upon certain covenants, contained in the said marriage contract. By these covenants certain rights were created in favour of Eliza Atkins, and certain other rights were created in favour of the children to be born of her marriage with Lepper. The condition: "That Lepper shall "and will have the right and power to alienate, sell and dis-"pose, without interruption from Eliza Atkins, of all and "every immoveable property that he may hereafter become "possessed of, and upon which property Eliza Atkins might "have a mortgage for the sum of £500, granted to her as "aforesaid:" deprived her of the power which she would otherwise have had of impugning any alienation which Lepper might make of any real estate subject to her mortgage for the payment of the sum of £500. But, that clause does not in express terms extend to the children to be born of the marriage, and I do not think it ought to be extended to them by implication. I hold it to be certain, notwithstanding some authorities to the contrary, that the parties to a marriage contract have a right to make any covenants they like, provided such covenants are neither prohibited by law nor opposed to sound morals, and if, in the case before us, the contract had given Lepper the same powers with respect to his children, that have been given to him with respect to his wife, I would have had no hesitation in giving effect to such a covenant. But, where the parties to a marriage contract desire to

create rights different from those to which they would be entitled under the common law, they must do so in express terms, and an exceptional power, given to the prejudice of one person, cannot be so interpreted so as to render it operative as against other parties. By the marriage contract in question, the husband was given the power of defeating, as regards his wife, a provision in the nature of conventional dower; but he was not, it seems to me, given such power as regards his children; and I, therefore, am of opinion that he could not exercise that power, so as to defeat the claims of his children as *douairiers*, they having renounced his succession. For these reasons, and without entering upon the discussion of the other questions raised, I am of opinion that the judgment of the court below which maintains the claim of the children under the marriage contract, and in effect declares that their claim could not be defeated by mortgages created by their father after the date of the marriage contract ought to be confirmed.

MONDELET, Justice: I am clearly of opinion that the judgment of the court below, awarding to Respondents £500 on their opposition as the children issue of the marriage of Lepper with Eliza Atkins, and dismissing the contestation of this opposition by Appellant, should be confirmed. The power to alienate, sell and dispose, without interruption from Eliza Atkins, is evidently limited to an alienation, sale or disposal of the property, as affecting the rights of the wife, and has reference solely to such mortgage which the wife might have on such property. This right cannot be extended in a way adverse to the interests of the children. I think we need not say any thing touching the other points, the present being decisive.

Judgment of the court below confirmed. (13 *D. T. B. C.*, p. 342.)

PARKIN and PENTLAND, for Appellant.

VANNOVOUS, for Respondents.

PROHIBITION D'ALIENER.

BANC DE LA REINE, EN APPEL, Québec, 16 mars 1863.

Présents : AYLWIN, DUVAL, MEREDITH, MONDELET, and BERTHELOT, Juges.

GUILLET dit TOURANGEAU, Appelant, *vs.* RENAUD, Intimé.

Jugé : Qu'une défense d'aliéner contenue dans un testament, par laquelle il est dit que les légataires, enfants du testateur, ne pourraient en aucune manière engager, affecter, hypothéquer, vendre, échanger, ou autrement aliéner les biens immeubles à eux légués, qu'après vingt ans à compter du jour du decès du testateur est valable et n'est ni impossible ni prohibée par la loi ni contre les mœurs.

MONDELET, Juge : La question a été, en cour de première instance, jugée sur la défense au fonds en droit à l'opposition. Voici ce dont il s'agit : Un père, par prudence, sans doute, impose à la disposition de ses biens à ses enfants, la condition suivante : " Il est spécialement ordonné que ces enfants ne pourront en aucune manière engager, affecter, hypothéquer, ou aucunement aliéner les biens immeubles étant dans leurs lots respectifs d'après les partages faits au dit testament, qu'après vingt ans à compter du jour du décès du testateur, sous peine de nullité de tous actes qu'ils feraient contraires à la dite intention du testateur." Le Défendeur, enfant du testateur, qui est décédé, a été poursuivi, et l'immeuble saisi sur lui. Sur ce, opposition de la part du Défendeur fondée sur la clause du testament sus-relatée. Le Demandeur a attaqué cette opposition par une *défense en droit*, et une *exception péremptoire en droit.* Il ne s'agit que de la *défense en droit.* La clause me paraît bien sage, et, assurément, qu'un père, en limitant à vingt ans le droit chez ses enfants, d'aliéner ou hypothéquer les biens qu'il leur laisse à la condition qu'il juge à propos de mettre à sa libéralité, ne doit pas être rencontré par la singulière raison qu'il ne devait pas être sérieux, que ce n'était qu'un avis, qu'un conseil. Quelques-uns des anciens auteurs se contentent de repousser cette condition ainsi imposée, mais quelles raisons donnent-ils ? Aucune, à mon avis, si ce n'est qu'il n'y a pas de substitution, ni de fidéicommis d'établi. Qu'a à faire cela à la question ? Il ne s'agit aucunement de substitution, ni de fidéi-commis et il me semble que le fils n'aurait dû rien dire de cela. Il n'y a aucun texte de loi qui affecte la clause dont il est question. Il faut donc, par conséquent, chercher dans la raison, la justice et une saine philosophie, la solution de cette question, qui, à mon avis, ne fait pas la moindre difficulté. Il n'y a rien de plus raisonnable que cette condition, c'est un acte qu'un père sage et prudent est censé avoir eu d'excellentes causes d'imposer. Le testateur pouvait ne pas laisser

ce bien à cet enfant, alors les créanciers n'auraient eu rien à dire. Il n'y a rien de plus juste envers les enfants, qu'il convient d'habituer à jouir en propriétaires sages et prudents, qu'il importe d'empêcher de faire passer leurs biens de famille en mains étrangères. Au reste, cette prohibition est limitée à vingt ans. Il y a dans cette disposition un acte d'une saine philosophie de la part du père, qui ne viole aucun principe, qui ne fait rien contre l'ordre public, ni contre les bonnes mœurs, c'est conforme à notre droit du Canada, Stat. de 1774, et Stat. de 1801, mais qui, par sa sagesse, contribue à faire faire, ce qu'il importe à la société de voir s'effectuer, l'économie et la prudence de ses membres, et la conservation raisonnable, pour quelque temps du moins, de la propriété, dont la stabilité est d'une grande importance. Je pense, va sans dire, que l'autorité de Troplong, en dit plus, en peu de lignes, que tout ce que certains auteurs se sont complu à répéter les uns après les autres; il est à peine nécessaire que j'ajoute que je préfère me ranger avec lui, du côté de la raison, de la justice et de la philosophie, en l'absence d'un texte formel de la loi, que d'accepter sans les soumettre à l'analyse raisonnée, les assertions crues de quelques auteurs qui se bornent à le faire, ou qui, pour appuyer leur sentiment, amènent la substitution et le fidéicommis en scène, là où il n'en est aucunement question. Je me contente donc de lire les quelques lignes de Troplong qu'appuie Demolombe, et de résumer toute ma pensée dans leur opinion si exactement exprimée, et bien mieux rendue que je ne le pourrais faire. (1) "No. 271: Que dirons-nous de la clause portant défense d'aliéner par vente, échange ou engagement, pendant un certain temps? Les opinions sont partagées. Mais je ne vois rien qui vicie cette condition, qui souvent est imposée par le testateur pour de bonnes raisons de prévoyance, de convenance, d'économie domestique. Le donateur, en donnant un immeuble à une personne de sa famille, peut cependant éprouver du regret de le voir, de son vivant, sortir des mains de celui qu'il considère comme un autre lui-même; il lui impose alors l'obligation de ne pas aliéner de son vivant. Dans d'autres circonstances, le testateur peut craindre que le légataire ne soit trop pressé de jouir et qu'il n'abuse du droit de propriété dont il le gratifie: pour l'accoutumer à être propriétaire, pour l'affectionner à sa propriété, il lui impose la condition de la garder pendant cinq ans. Ne sont-ce pas là des mesures sages et prudentes? Pourquoi les repousser avec une sévérité sans règle? La prohibition d'aliéner n'est censée contraire à la liberté qu'autant qu'elle est

(1) Troplong, Donations entre vifs, no. 271; Demolombe, no. 291 jusqu'à 303.

absolue; c'est alors seulement qu'elle est considérée comme non écrite" J'ajouterai pourtant que ce n'est pas parce que Troplong et Demolombe pensent ainsi que je me décide, mais parce que leur sentiment étant d'accord avec ce que je pense être vrai, je les cite comme appuis, et non comme autorité à laquelle il faille me soumettre. En pareille matière, je ne me soumets qu'à un texte de la loi, ou l'ordonnance. Je pense donc que le jugement de la Cour de première instance devrait être infirmé, et la défense en droit renvoyée.

BERTHELOT, Juge: Par son testament du 6 juin 1855, Gauvreau, notaire, feu Joseph Guillot dit Tourangeau a disposé de ses biens en faveur de ses enfants: " avec défense d'engager, " affecter, hypothéquer, vendre, échanger ou autrement aliéner les dits biens immeubles, qu'après vingt ans à compter " du jour du décès du testateur, sous peine de nullité de tous " actes qu'ils feront contraires à la dite intention du testateur." La question soulevée est de savoir si cette défense doit avoir son effet, ou si elle ne doit pas tomber à néant, attendu que le testateur n'a pas établi de substitution, et n'a pas indiqué à qui iraient les biens dans le cas où les légataires en aliénant auraient perdu la propriété ou la possession des dits immeubles: Il faut bien remarquer qu'il ne s'agit que d'une défense d'aliéner limitée à vingt ans, et non pas d'une défense d'aliéner pour toujours, et, si l'on voulait bien comprendre combien il y a de différence entre l'un et l'autre cas, on ne trouverait pas toute la difficulté que l'on croit voir dans cette espèce. Sous l'ancien droit français, une défense d'aliéner pour toujours, sans substitution, ou sans indication de personne pour recueillir dans le cas où la condition serait violée par le légataire ou le donataire, était regardée comme nulle et sans effet. C'est ce qui paraît être enseigné par Ricard et Pothier, aux endroits cités dans le factum de l'intimé, dans le cas d'une défense d'aliéner illimitée, mais ni l'un ni l'autre n'ont traité de la défense d'aliéner pour un temps, en sorte que l'on ne doit pas recevoir comme règle absolue, ce que l'un et l'autre nous enseignent sur ce sujet. Dans cette cause, il ne s'agit que de défense durant un certain temps, (cas tout différent) et qui est regardée avec raison par Troplong, *Donations*, No. 271, et par Demolombe, vol. 18, no. 294, comme étant une clause qui doit avoir son effet. Troplong s'exprime ainsi: " La prohibition d'aliéner n'est ainsi contraire à la liberté qu'autant " qu'elle est absolue: c'est alors seulement qu'elle est considérée comme non écrite." Demolombe, no. 294: " Mais si nous " considérons comme illicite la condition de ne pas aliéner, " lorsqu'elle est absolue et indéfinie, notre avis est, *au contraire*, qu'il faut la considérer comme licite, lorsqu'elle est " seulement relative et temporaire, et qu'elle se trouve d'ail-

" leurs justifiée par un intérêt sérieux. C'est ce qui peut arri-
" ver dans trois cas, à savoir : lorsqu'elle a pour but de garantir :
" *a.* soit l'intérêt du disposant ; *b.* soit l'intérêt d'un tiers ;
" *c.* soit même aussi l'intérêt du donataire ou du légataire."
Après avoir expliqué ce qu'il entend par l'intérêt du disposant et l'intérêt d'un tiers, il en vient au no. 303, à dire : " Enfin,
" nous avons dit qu'il se pouvait même que la condition de ne
" pas aliéner dût être considérée comme licite, dans le cas où
" elle aurait été imposée dans l'intérêt du donataire ou du lé-
" gataire. Cette dernière application de notre règle est, toute-
" fois, la plus délicate. Le disposant, par exemple, a mis pour
" condition que le donataire ou le légataire, qui est encore un
" jeune homme de 20 ans, ne pourrait pas aliéner avant d'a-
" voir atteint l'âge de 25 ans ou avant de s'être établi par ma-
" riage. Est-ce licite ? non, pourrait-on répondre : car une telle
" condition n'est qu'une prolongation de minorité et d'incapa-
" cité relativement à la chose donnée ou léguée ; et puis, si on
" peut défendre l'aliénation au gratifié pendant cinq ans, pour-
" quoi pas pendant dix ans, pendant vingt ans, pendant toute sa
" vie ? Nous avions d'abord été portés à le croire ainsi. Mais
" pourtant est-ce que l'on ne considère pas généralement comme
" licite la condition, qui serait imposée au donataire ou au
" légataire de ne pas se marier avant un certain temps ? Or la
" capacité de se marier est certes tout autant de droit public
" que la capacité d'aliéner ; et puisque la condition de ne pas
" se marier avant un certain temps, est licite, pourquoi la con-
" dition de ne pas aliéner avant un certain temps serait-elle
" illicite ? " Il me semble que l'on ne peut douter quel est le sentiment de l'auteur, et je ne vois pas qu'il se soit contredit en disant, au no 206, " qu'un légataire qui aurait consenti à
" l'aliénation ne serait pas reçu ensuite à se prévaloir contre
" les tiers auxquels il aurait concédé des droits, de la défense
" d'aliéner, qui lui aurait été imposée, et qu'il aurait lui-même
" enfreinte ; car il ne se peut pas qu'il évince ceux-là mêmes
" auxquels il doit garantie." Pandectes, vol. 12, p. 245, quand la défense d'aliéner fait présumer l'existence d'un fidéi commis : " Mais si les testateurs n'adoptent ce mode de disposition
" que dans l'intérêt de leurs enfants, descendants, etc., etc., elle
" doit être observée, cette défense toutefois ne peut préjudicier
" ni aux créanciers ni au fisc." Si donc pour se conformer à cette disposition l'héritier a vendu ses propres biens pour acquitter les dettes du testateur, les fidéicommissaires courront les mêmes chances. *L'on voit qu'il ne s'agit que des créanciers du testateur*, et non de ceux du légataire. Dans le cas actuel, le légataire n'a pas vendu ; il a contracté une dette, il devra la payer sur la garantie qu'il en a donnée et pouvait donner sur ses biens libres, ou *ceux qu'il tient de son père*, sur et à

même les revenus qu'ils pourront donner pendant vingt ans. C'est là l'étendue de la garantie qu'il a donnée et pouvait donner, il ne pouvait donner plus de sûreté que celle des biens tels qu'ils lui étaient donnés, et comme ils étaient donnés. Il n'y a eu aucune surprise ni mauvaise foi de sa part. Le créancier avec qui il a traité connaissait le testament du père, ou avait les moyens de le connaître, comment pourrait-il donc se plaindre ? et d'ailleurs, si le testateur n'eût rien donné à son fils ou n'eût légué qu'avec une clause d'insaisissabilité, qu'est-ce que le créancier aurait eu à dire ? Rien du tout. Enfin, Demolombe rapporte, au No 308, un arrêt de la cour de cassation infirmant un jugement de la Cour de Lyon, qui avait déclaré illicite et contraire aux lois,une clause par laquelle le donateur déclare que le donataire ne pourrait pas aliéner, même avec son consentement, laquelle clause avait été enfreinte par l'un et l'autre, cependant l'hypothèque consentie par le donateur et le donataire fut annulée. Sous notre législation actuelle, avec la liberté illimitée de tester ainsi qu'elle existe par le statut de 1801, je pense qu'il y a beaucoup plus de raison de suivre ce qui est enseigné par Troplong et Demolombe. Ricard, Pothier et autres auteurs ont écrit et raisonné sous l'empire d'un système différent du droit de tester, et nous ne pouvons recevoir leur doctrine sans restriction. Ne pourrait-on pas dire aussi que d'après la règle que le donateur ou testateur est libre d'apposer à sa libéralité telle condition qu'il lui plait, le legs dans les termes qu'il est fait doit avoir tout son effet suivant les intentions du testateur bien clairement exprimées ? C'est là ce que nous devons tâcher d'effectuer. L'on voit assez ce que le testateur a voulu. Si cette clause devait être sans effet je croirais qu'il serait bien difficile pour un testateur de s'exprimer de manière à s'assurer de l'exécution de ses volontés, pourvu toujours qu'elles ne fussent pas contraires à une loi positive ou aux bonnes mœurs, ce qui n'est nullement le cas dans ce testament, car ce sont là les deux seules exceptions qui peuvent empêcher de donner suite aux volontés d'un testateur. Dans le cas de doute entre les deux systèmes soutenus par les parties et les auteurs, je suis naturellement disposé et je crois que je dois pencher pour *la conservation des biens*, et les enlever à l'atteinte des créanciers durant le temps que le testateur l'a voulu, pour l'avantage de son légataire ; et, comme dit Troplong, *loco citato*, pour l'accoutumer *à être propriétaire*. En outre, je pense qu'il n'était pas opportun de décider la question aussi abstraitement qu'elle l'a été sur une défense au fonds en droit. J'aurais ordonné aux parties d'aller à la preuve afin que l'on pût voir et lire le testament. Je ne suis pas disposé à décider une question aussi importante sans lire le testament, et toute la procédure, et voir même la cause de la

dette. Il y aura peut-être alors quelques raisons d'équité qui nous porteront à ne pas mettre de côté la volonté du testateur, si sagement et si bien exprimée.

Ci-suit le jugement de la Cour de première instance: TASCHEREAU, J. "La Cour, considérant que la clause énoncée au testament de Joseph G. Tourangeau, en date du six juin, 1855, passé à Québec, par devant Mtre Gauvreau et son confrère, notaires publics, et en vertu de laquelle l'opposant prétend que les immeubles à lui légués par son père, et saisis en cette cause, ne pouvaient être légalement, quant à présent, saisis, à raison de la défense d'aliéner contenue en telle clause du testament, contient une défense d'aliéner qui ne peut en loi produire d'effet sérieux, et doit plutôt être considérée comme renfermant un conseil plutôt qu'une défense sérieuse d'aliéner: considérant, de plus, que la dite clause ne contient aucune disposition à l'égard des immeubles dans le cas où la défense d'aliéner serait violée par le Défendeur, et qu'il n'y a ni substitution d'établie, ni indication de personnes à qui iraient les biens dans le cas où le Défendeur, en aliénant, aurait perdu la propriété ou la jouissance des dits immeubles: considérant que la clause susdite ne peut être considérée comme léguant la propriété ou la possession des immeubles au Défendeur, à titre d'aliments, ou comme insaisissables à moins d'une stipulation expresse à cet égard: maintient la défense en droit du Demandeur à l'opposition afin d'annuler du Défendeur, et renvoie la dite opposition, avec dépens."

MEREDITH Juge: On the part of Respondent it is contended that a *simple défense d'aliéner* does not create a substitution, and is not in any respect binding in law; and, therefore, that notwithstanding such a prohibition, the donee or legatee may make a valid alienation of the property to which it refers. In support of this view, Respondent has referred to Ricard, who says: "Les lois ont résolu, par une décision générale, que lorsque " la prohibition est pure et simple, et sans cause, qu'elle ne " produit aucun effet et que, non seulement les héritiers *ab in-* " *testat* du testateur, ni celui à qui les défenses ont été faites " n'ont droit de prétendre aucun *fidéi-commis* en leur faveur, " mais aussi que l'institué ou le légataire ne laisse pas, non- " obstant la prohibition, d'avoir la liberté d'aliéner." (1) The opinion of Henrys, on this subject, is to the same effect, his words are as follows: "Donc, s'il y a quelques distinctions à " faire, c'est entre la prohibition d'aliéner pure et simple et la " prohibition d'aliéner faite en faveur de quelqu'un. *La pre-* " *mière n'opère rien*, et le testateur n'ayant pas passé plus

(1) 2 Ricard, des *Donations*, page 322, *Traité des Substitutions*, titre III, ch. 7, part. 1, No. 329.

" avant, elle ne passe *que pour un simple conseil;* mais, au " contraire si le testateur, en prohibant à ses héritiers et suc- " cesseurs d'aliéner les biens qu'il leur a délaissés, déclare que " c'est afin qu'ils soient conservés à ceux qu'il désigne: par " exemple, à ses descendants, ou à ceux de sa famille, en ce cas, " la prohibition d'aliéner emporte un *fidei-commis*, et c'est la " même chose que si les descendants ou ceux de la famille " avaient été substitués à l'héritier; il faut donc que la prohi- " bition soit faite en faveur de quelqu'un, pour empêcher que " l'héritier ne puisse pas vendre. C'est la disposition du droit " en la loi 38, §4, et de la loi 93 ff. de legat. 3, mais plus ex- " presse en la loi *filius familias.* 114.§ *divi* 14.ff. de legat. 1, " où, le jurisconsulte dit que les empereurs avaient décidé qu'il " ne suffisait pas de prohiber l'aliénation, mais qu'il fallait en- " core exprimer la clause, et déclarer la personne en faveur de " laquelle on recherchait cette précaution, qu'autrement, nisi " inveniatur persona cujus respectu hoc à testatore dispositum " sit, nullius esse momenti scripturam, quasi nudum prœcep- " tum reliquerit." (1) Pothier also says: " La simple défense " d'aliéner, lorsque le testateur n'a pas témoigné en faveur de " qui il faisait cette défense, ne passe, à la vérité, que pour un " simple avis, *nudum prœceptum*, auquel celui à qui la dé- " fense est faite peut impunément ne pas déférer." (2) According to the foregoing authorities a *défense d'aliéner* is to be considered *pure et simple*, unless it be stipulated in the interest, either of the party making the donation or legacy, or of some third person; and a *défense d'aliener pure et simple*, as above defined, is to be deemed merely as advice on the part of the person making the prohibition, and not binding upon the person to whom it is addressed. The reason upon which, as I believe, the above rules are founded being that in the case of a *défense d'aliéner pure et simple* there is no person interested, except the donee or legatee, and that a provision which cannot be enforced, except at the will, and by the party intended to be bound by it, cannot in law be held legal and binding. The Appellants, on their part, have drawn our attention to the opinion of Troplong and Demolombe, as showing that a *défense d'aliéner* when made the condition of a legacy, may, in certain cases, be unobjectionable, and, in such cases, ought to be enforced by the Courts. Troplong, in the passage cited in the factum of the Appellants says: " Que dirons-nous de " la clause portant défense d'aliéner par vente, échange ou enga- " gement pendant un certain temps? Les opinions sont parta- " gées, mais je ne vois rien qui vicie cette condition, qui sou-

(1) 3 Henrys, page 219, Li. 5, Ch. 4, Quest. 49, No. 2.

(2) 5 Pothier, *Des substitutions*, page 518: V. art. 972 C. C.

" vent est imposée par le testateur pour de bonnes raisons de " prévoyance, de convenance, d'économie domestique. Le dona- " teur, en donnant un immeuble à une personne de sa famille, " peut cependant éprouver le regret de le voir de son vivant, " sortir des mains de celui qu'il considère comme un autre " lui-même, il lui impose alors l'obligation de ne pas aliéner " de son vivant. Dans d'autres circonstances, le testateur peut " craindre que le légataire ne soit trop pressé de jouir, et qu'il " n'abuse du droit de propriété dont il le gratifie ; pour l'ac- " coutumer à être propriétaire, pour l'affectionner à sa pro- " priété, il lui impose la condition de la garder pendant cinq " ans. Ne sont-ce pas là des mesures sages et prudentes ? " Pourquoi les repousser avec une sévérité sans règle ? La pro- " hibition d'aliéner n'est censée contraire à la liberté qu'autant " qu'elle est absolue ; c'est alors qu'elle est considérée comme " non écrite." (1) And Demolombe, expresses his opinion as to this point in nearly the same words. In considering the following observations of Troplong and the opinion of Demolombe to the same effect, it is necessary to bear in mind that a very wide difference exists between the law of France and our own law as to the subject under consideration. The art. 896, of the Code Civil declares. " Les substitutions sont pro- " hibées, toute disposition par laquelle le donataire, l'héritier " institué ou le légataire sera chargé de conserver et de ren- " dre à un tiers sera nulle même à l'égard du donataire, de " l'héritier institué ou du légataire." (2) These provisions being altogether at variance with our own law on the subject, it is plain that the observations of Troplong and Demolombe must be read by us with great caution ; and, bearing this in mind, it appears to me that all that Troplong and Demolombe are to be understood as saying, in the passages relied on by Appellants, is simply, that a probibition to alienate, in a donation, or will, if made for a short time, and from reasonable motives, is not absolutely null even under the provisions of the Code Civil. Those learned writers show that such a provision can be enforced if made in the interest of the donee, or legatee, or of a third party ; and that if accompanied by a penal clause, the penalty may be enforced, in the event of a violation of the prohibition to alienate. But I am not aware that there is anything in the writings either of Troplong or of Demolombe, tending to establish that a prohibition to alienate, when made exclusively in the interest of the donee or legatee, can be enforced *by the donee or legatee, against*

(1) 1 Troplong, Donations et Testaments, No. 271 ; 1 Grenier, Donations, page 188.

(2) 18 Demolombe, page 328, No. 303.

his own acts and to the prejudice of his own creditors. In the present case, Appellant relies on a *défense d'aliéner*, in which, in so far as regards the property in question, no person but himself is interested, and the object of his opposition is to prevent the sale of the property in question for the satisfaction of a judgment rendered against himself, to enforce the payment of a debt which, it may be observed, to the extent of above £1100, appears to have been contracted after the death of the testator, whose will contains the *prohibition d'aliéner* relied on by Appellants. There is not, I repeat, so far as I know, any thing in the works of Troplong or of Demolombe to justify the pretension of Opposant. On the contrary, Demolombe says: " Il nous paraîtrait impossible " d'admettre le donataire ou le légataire qui aurait consenti " l'aliénation, à se prévaloir ensuite contre les tiers, auxquels " il aurait concédé des droits, de la défense d'aliéner qui lui " aurait été imposée, et qu'il aurait lui-même enfreinte ; car il " ne se peut pas qu'il évince ceux-là mêmes auxquels il doit " garantie." Troplong, also, in his *Traité du contrat de mariage*, No 3060, and seq. maintains the same doctrine. The foregoing observations, I think, suffice to prove that the opinions of Troplong and Demolombe are not in reality opposed to the authorities from our own law upon which the judgment of the Superior Court is based, but in order to remove any doubt as to the point I shall cite one further passage from the works of each of those authors. Troplong puts the question: " La prohibition d'aliéner forme-t-elle une substitu- " tion ?" and he thus continues. " Il faut répondre négative- " ment à cette question: Car cette prohibition ajoutée à une " institution est nulle en loi, et ne forme qu'un précepte nu, " *nudum præceptum*, qui ne lie point, qui ne donne d'action " à personne, et dont on peut dire avec Papinien qu'il a été " donné *obtentu consilii.*" (1) And Demolombe says: "On " paraît avoir de tout temps reconnu que la défense ou prohi- " bition d'aliéner ne constitue qu'un simple précepte non obli- " gatoire, *nudum præceptum*, lorsqu'elle est pure et simple; " c'est-à-dire, lorsqu'elle n'est pas faite en faveur d'une per- " sonne qui est appelée à en profiter *nisi inveniatur persona* " *cujus respectu hoc a testatore dispositum est.* L. 114, § 14, " *ff* de Leg.; Thevenot, Nos 129, 130; Coin-Delisle art. 896, " No 32." (2) It has however been said, and will, I believe be maintained, that the authorities relied on by Respondent have no bearing upon the present case, because they relate to prohibitions to alienate in connection with the doctrine of

(1) Troplong, *Donations et Testaments*, No 135. p. 198.

(2) 18 Demolombe, No 147, p. 172.

substitutions, and not (it is said) to prohibitions to alienate unconnected with a substitution, such as the case before us presents. The answer, I believe, to this objection is, that the two subjects are so closely connected, as to make it impossible to treat of them separately. A *défense d'aliéner* if made in favor of a third person, is (as has already been observed), in effect, a substitution; and is, therefore, in law obligatory. Whereas, if the *défense d'aliéner* is not made in favor of a third person it is not a substitution. In one very important point of view, therefore, in order to ascertain whether a *défense d'aliéner* is, or is not valid, it is necessary to inquire whether it does or does not amount to a substitution. This probably is one of the reasons which have caused the two subjects to be considered together by the most eminent French Jurists, who, I may observe, were not likely to treat as closely connected questions really independant of each other. There is another view which may be taken of this case, and which was strongly pressed upon our consideration by the learned counsel for the Respondent. The testator, in the will under consideration, without assigning any cause or reason for the *défense d'aliéner* which it contains, has extended it to all his legatees, and over the whole of his property for a period of twenty years; and it has been contended by the learned counsel for the Respondent, and, I think, with reason, that if such a clause is good for a period of twenty years, there are no grounds for saying that it could not be equally good for forty years, or for the lifetime of the legatees. Now the policy of our law is, and ought to be, that property over which a man has full control should be subject to the payment of his just debts, whereas the effect of the provision in question, if it be valid, is to enable legatees to hold property over which they have in reality unlimited control, free from the payment of their debts, and this irrespective of the nature of the debt sought to be secured, or of the extent of the property held subject to such condition. It has therefore been further contended by the Respondent, that the provision of the will upon which the Appellant rests his claim ought to be held null on the ground of public policy. It may however be answered that a testator may by an express provision to that effect bequeath property so as to be free from seizure for the debts of the legatee; (1) and that property left expressly *pour aliments* (as the authors say) is not liable to be brought to sale for the debts of the legatee (2). But admitting, for the sake of argument, and subject probably to certain

(1) 7 Pothier, *Proc. cir.* p. 197; 1 Pigeau, 613.

(2) 3 Ancien Denisart, vbo *Saisie-arrêt*, 23, n° 6, seconde partie, p. 9.

limitations, that the law sanctions the two descriptions of bequests just mentioned, when expressly made: still it is not the less true that bequests tending to prevent the alienation of property, and to enable the party holding it, either to pay his debts or not, just as it may please him, are not entitled to favorable consideration; and I think that, in giving effect to such clauses we ought not to go beyond the limits established by the authorities, or to add by reasoning from analogy to the number of exceptional cases, which, on special grounds, are already sanctioned by law; and this, I think, we practically would do, were we to give effect to the testamentary provisions relied on by Appellant. But, although, I think, the point just adverted to ought not to be passed wholly unnoticed, I wish it to be understood that the ground upon which I would deem it my duty to confirm the judgment of the court below is, that, in my opinion, it is a well established rule of law, that a *défense d'aliéner pure et simple*, such as that contained in the will before us is inoperative. This rule which, having its foundation in the roman law, appears to have been acted upon for centuries in France, has been transmitted to us as law by jurists such as Ricard, Henrys and Pothier, and is not controverted, so far as I know, by any writer upon the ancient or modern law of France. (1) I therefore think that the learned judge of the Superior Court was justified in taking that rule as his guide, and that his judgment, which purports to be founded upon it, and is in all respects in accordance with it, ought to be confirmed. Jugement confirmé.

The following is the judgment of the Court of Appeals: " Considérant que par le testament de J. G. Tourangeau, en date à Québec, 6 juin, 1855, devant H. L. Gauvreau, et son confrère, notaires, il est expressément ordonné que ses enfants, au nombre desquels est l'Appelant, ne pourraient, en aucune manière, engager, affecter, hypothéquer, vendre, échanger ou autrement aliéner les biens immeubles étant dans leurs lots respectifs, d'après les partages faits au testament, qu'après vingt ans à compter du jour du décès du testateur, sous peine de nullité de tous actes qui seraient contraires à la dite intention du testateur. Attendu qu'il n'y a rien qui vicie cette condition, qui a sans doute été imposée par le testateur pour de bonnes raisons de prévoyance, de convenance et d'économie domestique. Attendu que les seules clauses irritantes dans les dispositions entrevifs ou testamentaires sont celles impossibles, ou qui sont contraires aux lois ou aux mœurs. Que la condition imposée par un testateur à sa libéralité dans le but de rendre les immeubles par lui légués insaisissables par les créanciers du

(1) *Vide* Arrêt du parlement de Paris, in sept. 1584.

légataire, n'est ni impossible, ni prohibée par la loi, ni contraire aux mœurs. Attendu que la condition du legs n'est rien autre chose qu'une mesure sage et prudente, et que la prohibition d'aliéner doit être réputée équivaloir à une clause d'insaisissabilité temporaire. Attendu que, par le jugement rendu à Québec, le 5 mai dernier, (1862) de la Cour de première instance, par lequel la défense en droit de l'Intimé a été maintenue, et l'opposition de l'Appelant a été renvoyée, il y a mal jugé. Il est ordonné que le dit jugement soit infirmé; et, procédant à rendre le jugement du tribunal, il est ordonné que la défense en droit soit renvoyée." (13 *D. T. B. C.*, p. 278 et 350.)

CASAULT, LANGLOIS et ANGERS, pour l'Appelant.

BELLEAU et JOLICŒUR, pour l'Intimé.

VENTE.—CLAUSE RESOLUTOIRE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 12 décembre 1862.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET, and BERTHELOT, Justices.

THE PEOPLE'S BUILDING SOCIETY, Appellants, *and* EVANS, Defdt. in court below, *and* SPROWLS, Rep. l'Inst. Respondent.

Jugé: Que, dans le cas d'une vente moyennant une rente viagère, la rétrocession par l'acquéreur au vendeur, en vertu du pacte commissoire, ne peut être considérée comme une vente faite au vendeur originaire, de manière à donner préférence sur lui à des créanciers hypothécaires intermédiaires; pourvu que cette rétrocession soit faite sans fraude, et que les biens rétrocédés soient dans le même état et de la même valeur qu'à l'époque de la vente originaire: et, dans ce cas, il n'est pas nécessaire que le pacte commissoire ait lieu par sentence d'une cour de justice. (1)

MEREDITH, Justice: The Defendant, Julia Evans, and her sister Jane Evans, sold to Thornton R. Smith, two houses in Fabrique Street, in this city; the consideration of the sale being a *rente viagère*, of £425, payable quarterly. The deed of sale contained a *clause résolutoire* in the following terms: "Provided always, and it is hereby expressly covenanted and "agreed, by and between the said parties, that should Thornton "Rudolph Smith, his heirs or assigns, fail or make default in "the punctual payment of the aforesaid life rent, at the quar-"terly terms aforesaid, and at any time be two quarters in "arrears with the payment thereof, should Julia Evans and "Jane Evans, or either of them, see fit or deem expedient, the "present sale and conveyance shall become and remain null and

(1) V. art. 1536, 1539 et 2102, C. C.

" void, and, in such case, Julia Evans and Jane Evans, or either " of them, are hereby authorized to take and prosecute all such " proceedings in law as may be necessary or proper, as well to " rescind, annul and make void the present sale and convey- " ance, as to be reinstated in the absolute title and possession " of the aforesaid described and sold property, and to recover " and have all losses, damages, costs, expenses, and interests " suffered by them in the premises." The purchaser did not pay the life rent regularly, and, on the 16th August, 1855, he being then in arrear to the extent of more then two quarters, the vendors, on that account, instituted an action against him, to have the deed rescinded and declared null, but this action was discontinued. Afterwards, on the 22d of April, 1857, Smith, then being in arrear to the extent of eight quarterly payments, due under the deed of sale, the vendors and he, in pursuance of, and in order to give effect to the resolutory clause, entered into a deed of retrocession, by which he retroceded to them one of the two houses which he acquired under the deed of sale; the consideration of the deed of retrocession being a discharge in his favour of one half of the life rent payable under the deed of sale, and a further discharge of arrears to the amount of £850, due under the deed of Sale, and of other arrears to the amount of £260 due by Smith to the vendors, under another deed of sale. In the interval between the date of the deed of retrocession, namely on the 12th March, 1863, Smith obtained from Appellant a loan of £1000; for the payment of which he hypothecated the whole of the property which he had so acquired from Julia and Jane Evans; and the object of the action, in the Court below, was to enforce the payment of the hypothec which Smith had thus given to Appellants on the house which he subsequently retroceded to Julia and Jane Evans, as already mentioned. The action thus brought was directed against Julia Evans, as universal legatee of Jane Evans, and, as such, in possession of an undivided half of the house so retroceded by Smith. To this action, Defendant pleaded the facts already mentioned, connected with the sale and retrocession of the house. The Plaintiff replied that Smith had made considerable improvements on the property whilst it remained in his possession; that, during the same time, it had also greatly increased in value; and that the deed of the 22d of April, 1857, styled a retrocession, was, in truth, a deed of sale, the price or consideration being the arrears of £850 due under the deed of sale of the 22 January, 1852, the arrears of £260 due under another deed of sale, and discharge, for the future, of one half the life rent of £425. The parol evidence establishes that, whilst Smith was in possession of the property, a plate glass window was put

into the shop, in place of a window of common glass; that the front wall of the house, which had given way had been strengthened; and that water pipes had been placed in the house; the whole at an expense of £110 or £120; but no attempt was made to prove that, upon the whole, the house, at the time of the retrocession, was in better order than it was at the time that Smith acquired it; and it is to be recollected that the building was five years older at the date of the retrocession than at the date of the sale. The only evidence as to the property having increased in value, is that it appears that the M. Cremazie had leased it from the Dames Evans at £150 per annum, and that the Mrs Cremazie subsequently leased it from Smith for £200 per annum; but, whether the increase in the rent is to be attributed to the superior management of Smith to some other temporary cause, or to an improvement of the property of a permanent kind does not appear; and, everything considered, I do not think it is shown that any change had taken place in the property itself to prevent a retrocession of it, if otherwise unobjectionable, from being efficient. The learned judge in the Court below dismissed the action of Appellants on the ground that it had been brought against Defendant as the owner of an undivided half of the real estate described in the declaration, whereas, according to the views of that learned judge, the evidence showed that, at the time of the institution of the present action, Defendant was in possession, of the whole of the property as owner. I do not deem it necessary to enter upon an examination of the sufficiency of the reason assigned in support of the judgment of the Court below; because that judgment is, I think, right upon the merits. I have already said that I do not think it is proved that any change had taken place in the property in question, during the time Smith owned it, to prevent him from making a valid retrocession of it; and assuming this to be the case, then it is plain that the vendors, Julia and Jane Evans, now represented by Respondent, could, at the date of the deed of retrocession, have caused the deed of the 22nd of January, 1852, to be set aside, by legal proceedings, so as to defeat the hypothec created by Smith in favour of Appellants, and it appears to me that the authorities cited by Respondent, clearly establish that the deed of retrocession, which certainly is not tainted with any thing like fraud or bad faith, and which does not affect the rights of Appellants to any greater extent than they were liable to be defeated by a judgment, ought to have the same effect as a judgment setting aside the deed of sale would have had. The authorities cited by Appellants from Pothier and Guyot, establish that a resolutory clause has not the same effect under the french law, that it had

under the roman law; and that, under the old law of France, the vendor of property could not, of his own authority, and without a judgment, take possession of property to which he was entitled under a resolutory clause; but they do not establish that the resiliation of a deed, by consent, without fraud, in pursuance of a resolutory clause, ought not to have the same effect as a judgment of a court annulling the deed *for the same cause.* Of the authorities cited by Appellants the one which appears to make most in favour of their pretensions is in the No. 551 of the 7 vol. of Toullier, which is in these words: " La résolution peut encore se faire par le consente-" ment mutuel des parties; mais alors, comme elle n'a point " de cause nécessaire, c'est moins une résolution proprement " dite, qu'une convention nouvelle, qui ne peut porter aucun " préjudice aux droits acquis à des tiers, et qui opère une vé-" ritable mutation, dans le cas surtout où la chose vendue re-" vient à l'ancien propriétaire ou vendeur, par l'effet de la " vente ou rétrocession." It is to be observed, however, that Toullier refers to the case of a retrocession made without what he speaks of as, a *cause nécessaire;* whereas, according to the view which I take of this cause, the retrocession is based on a cause springing out of the deed of sale itself, which is a *cause nécessaire.* The opinion of Toullier, as expressed in the No. 551, above cited, is commented upon, it seems to me with justice, in the passage from Paul Pont cited by the Respondent which is as follows: " Ainsi quant " aux résolutions amiables, nous n'admettons pas la théorie " proposée d'une manière trop absolue par quelques auteurs, " et notamment par Toullier. La résolution, dit-il, peut se " faire par le consentement mutuel des parties; mais alors " comme elle n'a point de cause nécessaire, c'est moins une " résolution proprement dite qu'une convention nouvelle qui " ne peut porter aucun préjudice aux droits acquis à des " tiers. Cela est juste," observe Paul Pont: " mais seulement " dans le cas où la résolution n'a pas, en effet, une cause nécessaire et inhérente au titre d'acquisition; alors il faut pro-" téger les créanciers hypothécaires ou tous autres ayant un " droit réel sur l'immeuble contre les combinaisons fraudu-" leuses, à l'aide desquelles les parties intéressées pourraient " nuire à ces droits et les amortir, selon l'expression de Loyseau. " Mais si la résolution a réellement une cause nécessaire et " légitime, si le consentement de celui dont le droit est résolu " n'a été donné à l'amiable que pour prévenir une décision " judiciaire inévitable, il est juste que l'immeuble rentre affran-" chi entre les mains du propriétaire, et que les charges dont il a " été grevé par l'acquéreur ne survivent pas à la résolution. " *Et il a été exactement décidé, en ce sens, que la résolution*

" *amiable consentie sans fraude par l'acquéreur, pour défaut* " *de paiement de prix, opère aussi bien que la résolution* " *prononcée en justice, l'extinction des charges et hypothèques* " *créées par l'acquéreur sur les immeubles.*" (1) The views of the author last cited are fully borne out by Troplong, who says: " Je ne puis concevoir qu'une dissolution de contrat " convenue par voie de transaction, et pour éviter les frais " d'une procédure, ait des effets autres que la résolution pro- " noncée par jugement." (2) The opinion thus forcibly expressed by Troplong seems to me to be perfectly reasonable. The deed of retrocession by the debtor of Appellants to which they were not parties, is not to be deemed binding on them, if they can in the present case, show that the vendors (Julia and Jane Evans) received anything to which they were not entitled to the prejudice of Appellants, by the deed of retrocession, then it ought not to be enforced to the prejudice of Appellants; but, if they cannot show that the deed of retrocession gave the vendors anything beyond what they then would have been entitled to by a judgment, I do not see that Appellants have any reason to complain. It is true that, if the resolutory clause had been enforced by an action, Appellants might have taken alarm and have paid the arrears due to the vendors of the property, and thus protected their own interests. It is to be observed, however, that although the vendors did institute an action against Smith, Appellants did not think fit to pay the arrears due to the vendors. Moreover Appellants knew from the registry office the nature of Smith's title upon which their own hypothec depended. It was their interest to see, and they had a right to see, that the life rent due to the vendors of the property hypothecated in their favour was duly paid. They wholly failed to do so. Smith made default to pay eight payments of the life rent in consideration of which the vendors had parted with their property; the latter, after much forbearance, at last, took advantage of the resolutory clause in their favour, and for the exercise of that right, under the circumstances, the vendors seem to me in no respect blameable. It is possible that it might be an improvement in our law to require a vendor, before enforcing a resolutory clause in his favour, to give reasonable notice to all parties who by the registry office appear, either as purchasers or hypothecary creditors, to have claims liable to be affected by the enforcing of the right of the vendor; but it is certain that according to the law of France as introduced into this country, no such notice was required, and this for the plain reason that, before the establish-

(1) 2 Paul Pont, p. 647.

(2) 2 Troplong, *Vente*, n° 691.

ment of the registry system, the giving of such a notice would have been impossible. The complaint of Appellants seems to reduce itself to this: You the vendors exercised the resolutory clause in your favor without notice to us; and we are thereby injured. The answer of the vendors is simply: By the enforcing of the resolutory clause of which you complain, we obtained nothing to which we were not entitled by law, and we were not under legal obligation to give you any special notice of the exercise by us of our right. Moreover, by the registry office, you had notice of our right, and of the obligations of your debtor, and you were equally regardless of both. There still remains one point to which I desire to advert. It is the pretension on the part of Appellants that the deed of the 22 April, 1857, styled a retrocession, is not in reality a retrocession, but is a deed of sale, and, as bearing out this pretension, reference is made to the improvements made on the property in question by Smith, and to the consideration received by him under the deed of retrocession. I have already expressed my views as to the improvements alleged to have been made by Smith; with respect to the sums from the payment of which Smith was released by the deed of retrocession, it seems to me plain that Appellants, as creditors of Smith, cannot complain of releases given to him, by other creditors; for those releases instead of injuring Appellants, were advantageous to them, by improving the position of their debtor. Upon the whole, I am of opinion that the deed of the 22 April, 1857, is in reality, what it purports to be, a deed of retrocession; that, under that deed, Julia and Jane Evans, now represented by Respondent, obtained merely that to which they were entitled; and, therefore, I think that the judgment of the court below, in so far as it gives effect to that deed, ought to be confirmed.

BERTHELOT, Juge: La question soulevée par cette contestation résulte d'une action hypothécaire intentée par l'Appelante contre Julia Evans, comme propriétaire "d'une "moitié indivise appartenant ci-devant à Jane Evans, et "maintenant à la dite Julia Evans, à titre de légataire "universelle de la dite Jane Evans, dans l'emplacement et "la maison et ses dépendances, situés sur la rue de la Fa-"brique, en la haute-ville de la cité de Québec, bornée en front "au côté nord de la dite rue, en profondeur à la rue St. Joseph, "d'un côté par Ls. Turgeon, et de l'autre côté par la Défen-"deresse et représentant Thornton R. Smith." Julia Evans et Jane Evans, par acte notarié du 22 janvier, 1852, vendirent un immeuble avec deux maisons dessus construites, moyennant une rente d'argent de £425, avec la convention expresse et formelle de clause résolutoire au profit des venderesses, à défaut de paiement, pour faire rescinder cet acte et rentrer en pos-

session de l'immeuble vendu. Le 12 mars, 1853, Smith consentit une hypothèque au montant de £1000 au profit de l'Appelante sur l'immeuble par lui acquis. Le 22 août, 1857, Smith consentit volontairement devant notaires, à la résolution de l'acte de vente du 22 janvier, 1852, pour moitié, ou partie du dit immeuble adjoignant Turgeon, et ce au profit de Julia et Jane Evans, bailleresses de fonds, et ce en vertu de la clause résolutoire ci-dessus mentionnée. Par l'acte de rétrocession elles acquittèrent Smith de £1248.15 à elles dûs pour arrérages de rente, et réduisirent leur rente pour l'avenir à £212.10. Jane Evans étant décédée a laissé un testament instituant Julia Evans sa légataire universelle, qui, en cette qualité, est devenue propriétaire de la moitié indivise de la partie de l'immeuble qui a été rétrocédée par l'acte du 22 avril, 1857, et pour et à raison de laquelle moitié indivise elle est poursuivie hypothécairement. Julia Evans, par ses défenses, a invoqué la clause résolutoire stipulée à l'acte du 22 janvier 1852, et la rétrocession partielle qui s'en est suivie par l'acte du 22 août 1857, en prétendant que Smith n'était pas devenu propriétaire absolu de l'immeuble, mais qu'il avait eu seulement le droit de le devenir en payant la rente et pension viagère et les arrérages, et que son titre était sujet à résolution et rescision, qu'il n'avait pu consentir une hypothèque que sujette à la même résolution et rescision, et que l'acte de rétrocession du 22 août, volontairement consenti, avait mis au néant, quant à elle, l'hypothèque de l'Appellante. L'Appelante a répondu que Smith avait fait des améliorations considérables durant sa possession, ce qui avait augmenté la valeur de l'immeuble, et que l'acte de rétrocession n'était rien moins qu'une nouvelle vente par Smith aux Dames Evans, d'une partie seulement de l'immeuble par lui acquis d'elles, ainsi que des améliorations qu'il y avait faites. Il ne me paraît pas que les améliorations qui ont été faites par Smith de 1852 à 1857, soient d'une telle nature, ou pour un montant tel que cette partie des prétentions de l'appelante puisse être suffisamment fondée en fait, pour enlever à l'acte du 22 août 1857, son caractère de rétrocession par suite de la clause résolutoire stipulée à l'acte de 1852. Les améliorations qui ont été faites étant de celles que je regarderais comme d'entretien suivant le temps, et nullement d'une espèce à les faire regarder comme de ces grosses impenses qui augmentent de beaucoup la valeur de l'immeuble. Et si les loyers sont plus élevés qu'au temps de la vente, ce ne peut être dû qu'à l'augmentation de la propriété dans toute la ville de Québec en général, et non par suite des grosses réparations de Smith, et peut-être que bien passagèrement durant que le siège du gouvernement y sera fixé. L'action me paraîtrait bien intentée contre Julia Evans, pour une moitié indivise de cette partie de tout l'immeuble qui a été

rétrocédé par l'acte du 22 août 1857. Par cet acte Julia et Jane sont redevenues propriétaires par suite de la clause résolutoire de l'acte du 22 janvier, pour chacune une moitié indivise, en leur nom propre et personnel. Jane ayant testé en faveur de Julia, cette dernière comme sa légataire universelle est propriétaire d'une moitié indivise en vertu du testament de sa sœur, titre tout différent de la rétrocession du 22 avril ; quant à cette moitié, je ne vois pas comment l'on peut raisonnablement prétendre que l'Appelante pouvait être tenue d'exercer son action hypothécaire contre toute la partie de l'immeuble rétrocédé. De ce que, par la mort de Jane, et de son testament en faveur de Julia, celle-ci avait réuni sur sa tête la propriété des deux moitiés indivises, il n'y a là rien pour obliger en loi l'Appelante à intenter son action hypothécaire contre elle, pour tout l'immeuble dont elle était devenue propriétaire par différents titres. L'on a dit qu'il pourrait résulter des désavantages, si la moitié indivise seulement était déclarée hypothéquée et vendue. C'est raisonner *ab inconvenienti*, ce qui ne doit pas être, lorsqu'il s'agit d'appliquer un principe ou de l'exercice d'un droit. D'ailleurs, en point de fait, je nie qu'il puisse être plus dommageable à un propriétaire de n'être dépossédé et exproprié par décret, que de la moitié de ce qui lui appartient, et dans le cas actuel, et d'après la preuve faite, je croirais que la Défenderesse en souffrirait moins que si tout l'immeuble rétrocédé était déclaré hypothéqué, et, par suite du jugement, vendu par décret. Pour ces raisons, je crois que le motif du jugement de la Cour de première instance est mauvais, et insuffisant pour justifier le débouté de l'action. Maintenant, quant à l'autre question, celle de la suffisance de la rétrocession du 22 avril, 1857, par suite de la clause résolutoire de l'acte du 22 janvier, 1852, pour repousser l'action hypothécaire fondée sur l'acte du 12 mars, 1853, il s'agit de voir si en loi les venderesses, Julia et Jane Evans, pouvaient, sans le secours d'un jugement, rentrer dans tous leurs droits de propriété, faute par l'acquéreur Smith d'avoir satisfait au paiement de son prix d'acquisition, et ce par une rétrocession volontaire, sans que les créanciers intermédiaires fussent appelés pour défendre et soulever leurs intérêts hypothécaires. Il me semble, d'après toutes les autorités qui ont été citées dans les factums, de part et d'autre, et particulièrement par celles de Toullier, Troplong et de Paul Pont, qu'il résulte que le vendeur, en pareil cas, ne doit pas nécessairement recourir à l'action. Il le faut lorsque l'acheteur ne vient pas reconnaître et consentir à l'exécution de la clause, mais du moment qu'il y consent, et que la cause de la rétrocession remonte au terme du contrat, comme dans le cas actuel, pourquoi recourir à l'action, qui en ce cas ne ferait qu'appauvrir le débiteur commun ? Cette rétrocession devient

donc en tel cas légale et légitime, pourvu qu'elle soit faite sans fraude. Les parties font alors entr'elles et directement, ce qu'elles ont prévu, ce qu'elles ont voulu faire, en un cas convenu. Il n'y a alors aucune surprise, pas même pour les créanciers hypothécaires intermédiaires, qui ont pu et dû connaître l'existence de la clause résolutoire, et le cas possible et probable de sa mise en force. Ainsi point de grief pour les créanciers, et point d'action là où il n'y a pas de raison ou d'intérêt d'en exercer une. Par le droit romain, le vendeur qui avait stipulé le pacte commissoire, ou la clause résolutoire, pouvait, à défaut de paiement, se faire rendre sa chose de suite, par le fait seul de la négligence de l'acheteur, qui, une fois le délai passé, n'était plus admis à repousser l'exercice de cette action. Notre droit français est plus doux, et le vendeur doit obtenir la déchéance avant d'exercer le droit de reprendre sa chose, mais il ne va pas au-delà, et il n'y a rien pour exiger que cette opération se fasse par action. Ce n'est pas que le vendeur rentre en pareil cas, ou puisse rentrer en pareil cas, de son autorité privée dans sa chose, non, mais il le fait du consentement de son acheteur, et souvent pour son plus grand avantage et celui de ses créanciers. L'Appelante n'avait qu'un seul moyen d'attaquer la rétrocession, c'était de prétendre qu'elle avait été faite frauduleusement et par collusion, et au préjudice de ses justes droits, ce qu'elle n'a pas fait et ne pouvait faire. Je pense donc que l'action devrait être déboutée, mais parce que la résolution de l'acte par suite de la clause du pacte commissoire a eu pour effet d'éteindre, quant à cette partie de l'immeuble désignée en l'action, les droits hypothécaires de l'Appelante. Il y a peut-être une autre question que l'Appelante aurait pu soulever, savoir, si une rétrocession volontaire en semblable cas peut avoir lieu pour partie seulement de l'immeuble qui a fait l'objet de la vente, j'ai quelque doute là-dessus, mais je ne crois pas devoir soulever une difficulté qui n'a pas été invoquée. Le jugement de Lynch et Hainault, (1) me parait conforme à ces principes, aussi bien que le jugement (2) Pattenaude et Lérigé.

(1) Dans un acte de donation onéreuse contenant libéralité, le donateur a droit de stipuler la prohibition d'aliéner et d'hypothéquer et droit de reprendre l'immeuble, au cas de contravention à cette prohibition ; et la contravention à cette prohibition donne ouverture à l'exercice du droit que le donateur s'est réservé de faire résoudre cet acte. Si le donataire, après avoir, en contravention à la prohibition, hypothéqué l'immeuble ainsi donné, rétrocède, pour valeur reçue, cet immeuble au donateur, cette rétrocession a l'effet d'annuler l'hypothèque par lui consentie sur l'immeuble. (*Lynch* vs. *Hainault*, C. B. R., Montréal, 6 septembre 1861, LAFONTAINE, J. en C., AYLWIN, J. DUVAL, J. MEREDITH, J. et C. MONDELET, J. A., (dissident,) 9 *R. J. R. Q.*, p. 327.

(2) De droit commun, l'action en résolution de la vente, faute de payment du prix, appartient au vendeur, soit que la vente ait été faite à terme ou sans terme. Il peut exercer ce droit contre l'acquéreur et même contre tout acquéreur

MONDELET, Justice: I am of opinion that the judgment of the Court below should be reversed, and judgment given in favor of Appellants. The *hypothèque* created by Smith during the time he was proprietor of the property, which he has not properly speaking altogether retroceded, since the first act is in fact, to be executed, subsisted and still subsists, for the obvious reasons, that the first deed has not, as it should have, been set aside either by a full resiliation between the parties, or by a Court of Justice. If the retrocession had really been made in *the entire*, which is not the case however, then, such retrocession could not affect or impair the vested rights, *droits acquis* of third persons, that is evident. The Court below has further erred in rendering its judgment on the *assumed* ground that JuliaEvans was proprietor of the whole,and not only of one half of the property. Independent of the fact that such a point has never been raised *formally* by exception, it mattered very little whether it was so or not, inasmuch as Jane Evans was certainly proprietor of one half if she was propri·tor of the whole; but the fact is, there is no evidence in the case, which could have justified the Court below, in grounding its judg-

ubséquent qui a enrégistré son titre, quand même le premier acte de vente n'aurait pas été enrégistré. Le second acquéreur sera condamné à rendre compte des fruits et revenus, si mieux il n'aime payer le prix de la première vente. Le droit de porter cette action n'a été en aucune manière affecté par les lois nouvelles concernant le régime hypothécaire ; et, par conséquent, le défaut d'enregistrement de l'acte de vente ne peut préjudicier à l'exercice de cette action. Lorsqu'un immeuble acheté est revendu le même jour, et que le second acte de vente seulement est enregistré par le second acquéreur, et que la créance du premier vendeur qui consiste dans le prix de la vente n'est pas tenue secrète au second acquéreur, qui, par son acte d'acquisition, s'engage personnellement à payer cette créance au premier vendeur à l'acquit du premier acquéreur second vendeur, le second acquéreur ne peut se dire, au préjudice du premier vendeur, tiers acquéreur de bonne foi aux termes et selon l'esprit de la première section de l'Ordonnance d'enregistrement (1841, 4 Vict., ch. 30.); d'autant plus que le premier vendeur peut invoquer contre lui, à raison de l'enregistrement qu'il a pris du second acte de vente cette disposition du Statut de 1843, 7 Vict., ch. 22, s. 6 qui porte "que l'enregistrement tout au long de tout document, écrit, acte ou chose, sera suffisant pour conserver les droits de toutes les parties intéressées en icelui, d'une manière aussi efficace que s'il eût été enregistré à la demande de ces parties respectivement." En cas de délégation, cette délégation devient parfaite par l'enregistrement ou inscription, qui en est pris par le créancier, ou à son profit, et selon la dite disposition du statut de 1843, l'enregistrement qui est fait du second acte de vente profitant non seulement au second acquéreur mais encore *à toutes les parties intéressées en icelui* doit être censé avoir le même effet que s'il eût été fait à la demande du premier vendeur, et, par conséquent, vaut, en sa faveur, une acceptation de la délégation contenue au dernier acte de vente. Sous l'édit de 1771 concernant les hypothèques, la simple indication de paiement valait opposition et dispensait les tiers indiqués d'en former une. Cela a été jugé dans le district de Montréal en 1843, dans une demande en ratification de titre, *ex parte Vallée*. (*Pattenaude* et *Leriger de Laplante et al.*, C. B. R. en appel, Montréal, 12 mars 1857, LAFONTAINE J. en C., AYLWIN J., DUVAL J., et CARON J., 1 *J.*, p. 106.) La loi a été modifiée par le Code Civil quant au droit de résolution. V. les art. 1536, 1537, 1538, 1539 et 2102 C. C.

ment on such a pretended *whole* proprietorship. I think, therefore, the judgment of the Court below should be reversed, and judgment awarded in favor of the Appellants. (13 *D. T. B. C.*, p. 288.)

HONORAIRES DU GREFFIER DES APPELS.

CIRCUIT COURT, Quebec, 23rd May, 1862.

Before TASCHEREAU, Justice.

REGINA *vs.* HOLT, *et al.*

Jugé: 1° Que les honoraires et taxes payables aux greffiers des appels Banc de la Reine, appartiennent à la Couronne et forment partie du revenu.

2° Que le droit d'action pour le recouvrement de tels honoraires et de telles taxes appartient à la Couronne seule, et non au greffier des appels qui est simplement agent pour en faire le recouvrement.

This was an action brought by the Clerk of the Court of Appeals in the name of the Crown for certain office fees and taxes mentioned in the tariffs of the Court, which fees and taxes it was alleged formed part of a fund known as the "fee fund." On behalf of Defendants, it was pleaded that the action could not be maintained: 1st Because it was brought to recover a certain amount alleged to be due for fees of office payable to the clerk of the Court of Queen's Bench. 2d. Because the right of action for such fees is vested in the said Clerk of Appeals, and not in Our Lady the Queen.

JUDGMENT: Considérant que l'action est instituée pour recouvrer certains honoraires d'office et taxes formant partie d'un fonds appartenant à Sa Majesté, appelé fonds des honoraires des officiers de justice, et que quoique les dits honoraires et les dites taxes doivent être demandés et retirés de qui de droit par le Greffier de la Cour du Banc de la Reine, siégeant en appel, le droit d'action pour en recouvrer le paiement en justice, réside exclusivement en Sa Majesté la Reine, et que le Greffier ne doit être considéré que comme l'agent ou mandataire public, préposé à la collection des dits honoraires, et des dites taxes, la Cour renvoie, avec dépens, la défense en droit des Défendeurs. (13 *D. T. B. C.*, p. 306.)

CASAULT, LANGLOIS et ANGERS, *pro Regina.*

HOLT et IRVINE, pour les Défendeurs.

OBSTRUCTION D'UNE RIVIERE FLOTTABLE.

QUEEN'S BENCH, APPEAL SIDE Québec, 19 juin, 1863.

Before : AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

REGINA, Appellant, *and* PATTON, Respondent.

Jugé : Qu'un *boom* placé sur une rivière ou sur un cours d'eau flottable, est une nuisance publique, à laquelle toute personne peut remédier. (1)

This was a question of law which arose on the trial of William Patton, before the court of Queen's Bench, Crown Side, at the term held at Montmagny, in October, 1863, and reserved by the presiding judge, Gauthier, for the consideration of the court, on the appeal side, under the provisions of the Con. Stat. of Canada, cap. 23. The indictment against Defendant was for having, on the 8th of May, 1862, on the river du sud,

(1) La rivière St. François à Lennoxville est une rivière navigable et flottable, et le lit de cette rivière n'appartient pas aux propriétaires riverains. C'est une voie publique à l'usage du public, et personne n'a le droit de l'obstruer de manière à en empêcher le libre usage. Le Statut du Canada de 1842, 5 V., ch. 17, décrète *que toute personne qui jettera dans une rivière, ruisseau ou cours d'eau dans le Canada-Est, des dosses, écorces, croûtes, troncs d'arbre et autres matières et bois de rebuts, de moulin, excepté de la sciure de bois, et les y laissera séjourner et obstruer telle rivière, ruisseau ou cours d'eau, encourra pour ce faire une pénalité n'excédant pas dix shelings courant, et qui ne sera pas de moins de cinq shelings courant pour chaque jour que ces matières de rebut y séjourneront, après qu'elle aura été requise par la partie intéressée à les enlever, en sus de tous les dommages qui pourraient en résulter.* Le Statut du Canada de 1851, 14 et 15 V., ch. 102, déclare que *toute personne a le droit de faire un libre usage de toute rivière navigable, ruisseau ou cours d'eau et de leurs rives sur l'un et l'autre côté, propre au flottage et au transport du bois ou bois de construction, et pour les fins générales de la navigation ; et que toutes les dites rivières, ruisseaux ou cours d'eau et leurs rives sur l'un et l'autre côté, au degré nécessaire et conforme aux lois, usages et coutumes de cette province du Bas-Canada, seront et resteront libres au public ; pourvu toujours que toutes les personnes passant et débarquant sur les rives de toutes telles rivières, ruisseaux ou cours d'eau, seront tenues de réparer aussitôt après, les clôtures, égouts ou fossés qu'elles auront endommagés, et de payer tous les dommages résultant de leur fait.* Le Statut du Canada de 1853, 16 V., ch. 191, qui a été étendu au Bas-Canada par le Statut du Canada de 1855, 18 Vict., ch. 84, *autorise* (s. 1,) *tout nombre de personnes, non moindre que cinq, à se former en compagnie aux fins d'acquérir ou construire et entretenir toute chaussée ou chaussées, glissoire ou glissoires, jetée ou jetées, bôme ou bômes, ou autres travaux nécessaires pour faciliter la descente des bois de construction par aucune rivière ou ruisseau ; pourvu* (s. 21,) *que ce ne soit pas un cours d'eau déjà navigable.* Ce Statut indique que la loi ne veut pas permettre l'obstruction des rivières navigables. Toute personne a le droit de se servir des rivières pour y descendre des billots, mais elle ne peut user de ce droit en nuisant à ceux qui veulent en descendre comme elle. Elle n'a pas le droit d'y construire un bôme causant des inconvénients aux autres et obstruant la navigation, et une personne qui a des billots à descendre dans une rivière navigable et flottable peut enlever un bôme construit par un autre et faire passer ses billots, de la même manière qu'il pourrait enlever une nuisance dans un chemin public pour y passer, sans avoir recours aux procédures lentes de la loi. *Chapman* vs. *Clark et al.*, C. S., SHERBROOKE, 27 janvier, 1858, 6 R. J. R. Q., p. 178. V. art. 400 C. C.

unlawfully and maliciously, cut, loosened and broken up, against the form of the statute in such case made and provided, a certain boom the property of &c. It appeared at the trial that, at the time the boom was broken by Defendant, it was stretched across the river du sud, which was proved to be a floatable stream, and prevented the passage of Defendant's saw logs. It was urged, on behalf of Defendant, that the private prosecutors had no right to place a boom across the river, and thus prevent any of Her Majesty's subjects from its free use, that the public had the use of all streams which are navigable and floatable, they being the Queen's highways, and at common law free to the public; that the boom, at the time of its being broken by Defendant, prevented the free use of the river, and was a public nuisance, and was cut and loosened by Defendant for the purpose of floating his timber; that in breaking the boom for the purpose of floating his logs down the river, Defendant merely abated such public nuisance which by law he had a right to do. The presiding judge, in his charge to the jury, directed them to find whether sufficient notice had been given to open the boom before proceeding to break it, and that, if they were of opinion that a sufficient notice had been given, then they should acquit Defendant, but that, if on the contrary, they found that no reasonable notice had been given, then they should bring in a verdict of guilty. On this charge, the jury found against the prisoner. A motion in arrest of judgment was then made, founded on the reasons urged at the trial, and also on the misdirection of the judge concerning the giving of notice. The question submitted were reserved by his honor the presiding judge, for the opinion of the Queen's Bench sitting in appeal and error.

ANDREWS, in support of Defendant's pretensions, took the same objections as noted above, and produced the following authorities in support of his argument. (1)

MORISSET, pour la poursuite, prétendit que la question de droit soumise à la cour avait déjà été décidée lors du procès par le juge qui y présidait, et la loi ne permettant au juge de référer à la Cour d'Appel que des questions de droit sur lesquelles il pouvait y avoir des doutes, il s'ensuivait que les questions une fois décidées par le juge qui présidait la cause ne pouvaient plus être réservées à la décision d'un tribunal supérieur; que le *boom* dont il s'agissait était construit sur

(1) *The Seigniorial Questions* voi. A. 29th question, and also pages 131 and 273; Hawkins, *Pleas of the Crown*, vol. 2, pages 152, 144, 148; Deacon's *Crim. Law*. vol. 2, vbo *Nuisance*; *Code Civil du Bas-C.*, book 2d. cap. 3, art. 26, p. 100; *Bell's Com.*, vol. 3, cap. 1, sec. 4; 6 Vic., cap. 17; 14 and 15 Vic., cap. 191. sec. 21, and 18 Vic., cap. 84; *Code Civ.*, 538.

une rivière simplement flottable, etc. Que la loi du Bas-Canada, entr'autres, le statut d'agriculture, dans le but de favoriser le commerce des bois, permettait à ceux qui descendaient du bois dans les rivières, d'entrer sur des terrains ensemencés aux risques d'y causer de graves dommages. Puisqu'elle faisait ainsi une exception au droit commun, dans le but de favoriser le commerce des bois, elle devait permettre, comme conséquence naturelle, de faire tous les actes nécessaires pour prévenir la perte du bois qu'on faisait ainsi flotter. Sans la construction des *booms* le commerce des bois serait impossible, et l'existence de pareilles constructions ne devait préjudicier à personne. En donnant un avis raisonnable au propriétaire d'ouvrir son *boom*,celui-ci se conformait à l'avis de manière que les rivières flottables servissent à tous, et le commerce des bois devenait possible à tous. Que la présente question ne devait pas être décidée d'après les autorités anglaises, citées par la défense. Ces autorités étaient applicables dans un pays où les forêts étaient depuis longtemps épuisées, et où les cours d'eau ne servaient qu'à la navigation. Mais qu'elle devait être décidée d'après la législation de ce pays, et la sec. 13, cap. 23, Stat. Ref. du B. C., sur laquelle l'accusation était basée, laquelle était conçue en termes si généraux, si positifs, qu'il ne restait aucun doute dans l'esprit quant à sa portée ; elle s'appliquait à tous les cas. Cette section, il est vrai, se rencontrait dans un statut qui ne concernait que les terres publiques ; mais qu'on en conclurait faussement qu'elle ne s'appliquait qu'aux *booms* qui appartenaient au domaine public. Il n'était pas rare, dans notre législation provinciale, que l'on trouvât dans un chapitre de nos statuts une section complètement étrangère à la matière dont il s'y agissait. D'ailleurs, en reférant au statut 12, Vict., cap. 30, d'où cette section était tirée, on voyait clairement que la législation avait pour objet, non seulement la vente et la coupe du bois sur les terres de la couronne, mais aussi de protéger géneralement le commerce des bois. A preliminary question arose as to the sufficiency of the question submitted by the Court below ; upon this preliminary question, DUVAL and MEREDITH Justices, dissented from the majority of the Court.

DUVAL, Justice, *dissentiente*: Three of the judges are of opinion that the question submitted to the Court ought to be referred back to enable the justice who presided at the trial to state the question more fully, Judge Meredith and myself are however of opinion that the question as submitted is sufficient, as the judge at Montmagny gives the indictment and the evidence, the former shewing the boom to be private property, the latter that it was placed across a river which was *flottable ;* and that the question submitted is sufficiently clear

and explicit to enable this Court to express its opinion that the Defendant had a right to break the boom in question.

MEREDITH Justice, *dissentiente*: Agreed with Duval that the question submitted should be taken in connection with the indictment, and thought the question sufficient because the indictment shewed the boom to be private property.

MONDELET, Justice: The majority of the Court expressed no opinion as to the merits of the question submitted. He did not, because it had been raised on a motion in arrest of judgment. The presiding judge having already expressed his opinion at the trial, he questioned his right now to retrace his steps and ask this Court whether or not his opinion was correct. But the question submitted to this Court "can a boom be cut without notice" is insufficient; for this Court cannot look at the indictment which shows it to have been private property. We can only look at the question as submitted, and it does not show whether the boom was public or private property. The question having been sent back to the judge who submitted it, with directions that the question should show whether the act of Defendant had been committed on a boom or in a place which had relation to public lands. The judge *en première instance* having reported that it was not proved that the offence had been committed upon a boom or in a place having relation to public lands, the question again came before the Court of appeals.

MEREDITH Justice: The majority of the Court think that the Con. Stat. Can., cap. 23, does not apply to private booms, in my opinion, it applies equally to private as to public booms; we all agree that, if the boom was a public nuisance, any party injured by it had a right to abate the nuisance; with me, the question is, was this boom a nuisance or not, and this is a question of fact which should have been decided by the jury. The question should not have been, "was notice given or not," but "was the boom a nuisance. My opinion is that there should be a new trial. My answer to the judge submitting the question to us would be "guilty, if not a nuisance, not guilty, if a nuisance," there would then be a new trial, and it would be left to the jury to declare whether or not the boom in question was a public nuisance.

MONDELET, Justice: A statute must be taken as it is, and when its object is to protect public interest its clauses must be received in that light. The Con. Stat. of Canada, cap 23, was passed clearly with that intention, and throughout has reference to public interests. As to its being for the jury to decide the question of nuisance or no nuisance, this is only true to a certain extent. A nuisance is defined by law. A jury not having a full knowledge of the law, may declare that to

be a nuisance which by law is no nuisance, or, on the contrary, may make that no nuisance which the law distinctly says shall be considered one. In the present case, the boom clearly was a nuisance, and any person had a right to abate it.

AYLWIN, Justice: This case presents considerable nicety in the construction to be put upon the statute. The statute speaks in general terms, it says "all booms" but is it not to be restricted; Dwarris, on Statutes, lays down that statutes are sometimes to be extended from one to several cases, and sometimes restricted from general to particular cases. Until the passing of the Con. Stat. Can., cap. 23., concerning the public lands, there was no offence in the breaking of booms, and the offence came under the 28 sec. of cap. 93, Con. Stat. Can. Now under the 23 cap. Con. Stat. is it to be understood that every species of boom is referred to no matter of what description or value? No, it refers simply to such booms as are mentioned in the act, having reference to public lands.

JUDGMENT: It is considered and adjudged that there is no offence alleged or proved within the statute, and that, therefore, the motion to arrest judgment be allowed, and Defendant be permitted to go without day. (13 *D.T.B.C.*, p. 311.)

MORISSET, for prosecution.

ANDREWS and ANDREWS, for Defendant.

REVENDICATION.—TAXES MUNICIPALES.

CIRCUIT COURT, Québec, 25th February, 1863.

Before STUART, Justice.

LANGLOIS *vs.* THE CORPORATION OF THE PARISH OF ST-ROCK SOUTH, *et al.*

Jugé: 1° Qu'une action en revendication peut être portée pour recouvrer la possession de meubles illégalement saisis.

2° Que les conseils locaux ne peuvent, en vertu du Stat. Ref. du B. C. cap. 24, imposer une taxe spéciale pour l'acquisition d'une pompe à feu.

3° Que toutes taxes doivent être imposées proportionnellement sur tous les contribuables d'une municipalité, et non sur une partie seulement.

This was an action of revendication brought to recover possession of certain moveables, alleged to have been illegally detained by Defendants. These moveables had been seized by virtue of a warrant of the mayor of the Corporation of St-Roch South, to levy a sum of £3 2 6, amount of a special tax imposed under a by-law of the council, to provide for the purchase of two fire engines for the use of the municipality, and the action was directed against the corporation and

against the guardian appointed to the seizure made under that warrant. The tax was imposed upon that portion of the municipality lying to the East of the Scott's bridge road, being the portion most thickly inhabited and where a fire engine would most likely be required. It was admitted that the corporation of St-Roch south was not a town or village municipality, but a local municipality, under the provisions of the Lower Canada Municipal Act.

LANGLOIS, C. R., for Plaintiff, argued that, under the provisions of the L. C. munipal and road act, the power of levying taxes for fire engines being expressly given to town and village councils, and no mention being made of such authority in the powers conferred upon local councils, the latter were not within the intention of the act, *inclusio unius fit exclusio alterius;* this was evident from the reading of the act, which after defining the powers of local councils, proceeded to say that "in addition to the powers herein before conferred upon all local councils, the municipal council of every town and village municipality, may make by-laws for all or any of the following purposes, establishing markets, duties on vehicules, &c., purchasing fire engines." That, in any case, the council had no discretion to tax one portion of the municipality rather than the other, but that every tax must be imposed rateably upon the whole of the inhabitants.

ANDREWS, for Defendant, by the powers by law given *to all municipal council,* Con. Stat. L. C. ch. 24, sec. 24, sub-sec. 3 every council may make by-laws for the purchase of moveable or immoveable property for the use of the municipality, and by the same statute which gives these powers, it is enacted (sub-sec. 8) that they may make by-laws *for raising and leveying any sums* of money necessary for any purpose within the scope of the functions of such council, such sums to be raised by rates equally assessed upon all the parties liable thereto in proportion to the value of their assessments, and, by the 27th sub-sec., it is provided that the council may impose and levy upon the parties interested in any work, or any part of the inhabitants of the municipality, a special tax to provide for the payment of such work. But, by the same statute, sec. 28, special powers are given to town and village councils, among which (sub. sec. 16) that of defraying, *out of the funds of the municipality,* all such expenses as the council deems just to incur for the purchase of engines or other apparatus necessary for the prevention of accident by fire. Again, because this special power is given to town and village councils, it is argued that other municipal councils have not that power, but that is a supposition at variance with the very terms of the law which says: all coun-

cils may purchase moveables for the use of the municipality, and the section which gives that power to all municipal councils directs that such moveables shall be paid for by a *special assessment* for that purpose, whereas the clause in the act which gives the power to town and village councils to purchase fire engines, is rather a power to pay for them *out of the funds* of the corporation, for, as the Plaintiff contends, *all corporations* under the act have the power to purchase moveables, the town and village corporations may pay for fire engines out of the funds of the corporation, other municipal councils must provide a special assessment for such purpose. The funds of a corporation and special assessments are not monies the proceeds of the same source.

STUART, Justice: In this case, judgment must go for the Plaintiff. Under our municipal and road act, it would seem that, although a local council may possibly have the right to pay for a fire engine out of its surplus funds, if such there are, yet, that it has not the power to impose a rate for that specific purpose: but, upon that question, it is not necessary for the court to decide, for, in any case, it is clear that there can be no right to tax one portion of the inhabitants of a municipality and not the other. If such a rule were admitted there could be no limit to its operation.

JUDGMENT: The court, doth declare the seizure made in this cause good and valid, and doth order that the articles seized be delivered to Plaintiff, &c. (13 *D. T. B. C.*, p. 317.)

LANGLOIS and POZER, for Plaintiff.

ANDREWS and ANDREWS, for Corporation.

CHOSE JUGEE.

COUR DE CIRCUIT, Québec, 23 septembre, 1863.

Présent: STUART, Juge.

WHELAN *vs.* KEELER.

Jugé: Que *res judicata* peut être valablement plaidé à une action fondée sur des jugements contre le Défendeur, au profit de tiers qui ont transporté ces jugements au Demandeur.

Le Demandeur réclamait, par son action, $97.37, montant de treize jugements, rendus dans le cours de janvier dernier, par la Cour de Circuit, à Québec, en faveur de divers Demandeurs, contre le présent Défendeur. L'action alléguait un transport sous seing privé, consenti en faveur du Demandeur, pour

les capitaux, intérêts et frais des jugements, et concluait à ce que le Défendeur fût condamné à lui en payer le montant, avec intérêts, suivant les jugements primitifs, et les frais tant de ces premières poursuites, que de la présente action.

PLAMONDON, pour le Demandeur : Le Demandeur est, il est vrai, aux droits de ceux qui lui ont cédé leurs jugements, mais ces jugements ne sont pas pour cela exécutoires pour lui ; pour les rendre tels, il a fallu prendre la présente action, et demander une condamnation qui pût permettre au Demandeur de prendre en son nom une exécution.

BOSSÉ, pour le Défendeur : Le but de toute action ne peut être que de faire déclarer exécutoire contre les biens du Défendeur la réclamation que peut avoir le Demandeur ; dans la présente cause, le Demandeur a déjà son remède, il a une créance exécutoire contre tous les biens de son débiteur, et n'a rien à gagner en obtenant un nouveau jugement, il se trouve donc sans intérêt. Le Défendeur de son côté ne peut opposer aucune défense, puisque tous ces moyens ont dû être présentés lors des premières poursuites. Il y a chose jugée entre lui et les auteurs du Demandeur. Si le Demandeur réussissait à obtenir une seconde condamnation, il n'y aurait aucun terme aux poursuites, et les frais pourraient s'accumuler à l'infini, au gré du Demandeur, sans que le débiteur pût y apporter aucun obstacle. (1)

STUART, Juge : Il est de toute evidence que, dans l'espèce, un jugement ne peut servir de base à une action ; autrement la sentence rendue par un tribunal ne serait jamais définitive, et il n'y aurait aucune garantie pour le débiteur.

JUGEMENT : Action déboutée. (13 *D. T. B. C.*, p. 363.)

PLAMONDON et GUILBAULT, pour le Demandeur.

BOSSÉ et BOSSÉ, pour le Défendeur.

LOUAGE.—SOUS-LOCATAIRES.

CIRCUIT COURT, Quebec, 23rd September, 1863.

Before TASCHEREAU, Justice.

LAMPSON, Plaintiff, *vs.* NESBITT, Defendant, and DINNING, *et al.*, Intervening parties.

Jugé : 1° Qu'aux termes de l'article 162 de la *Coutume de Paris*, les effets des sous-locataires, garnissant les lieux, sont responsables envers le propriétaire pour le montant de ses loyers, quand bien même ils les auraient payés de bonne foi à leur locateur immédiat.

2° Que quand dans le bail du propriétaire, il y a une clause à l'effet

(1) Vide Rogron, sur l'art. 1351, *Code Civ.*, p. 442 ; *Pelletier* vs. *Freer*, *Suprà*, p. 59.

que le locataire ne pourra sous-louer sans le consentement du propriétaire, telle clause doit être exécutée strictement, et le sous-locataire sera censé connaître telle clause, et ne pourra en conséquence prétendre que les effets garnissant les lieux loués ne sont pas responsables des loyers.

3° Que, quand un locataire sous-loue tous les lieux pour un loyer moindre que celui qu'il s'est obligé de payer, les effets du sous-locataire sont responsables pour tout le montant des loyers.

This was an action for the rent of a shipyard and premises described in the declaration, commenced by an atttachment, *saisie-gagerie*, by which a floating dock, garnishing the premises, was seized. The intervening parties filed a demand in intervention, in which they alleged that the floating dock seized was their property and in their possession, and that, at the time of the seizure by Plaintiff, there was no rent due by them, that the same had been paid by them to Defendant, as it accrued, in virtue of the stipulation in the lease of the premises to them, the intervening parties, by Defendant, and, in accordance with usage, and concluded that they might be permitted to intervene in the cause; that they should be declared the owners of the floating dock; that they had rightly paid the rent of the premises, wherein the floating dock was at the time of the attachment, to Defendant, their lessor, before the attachment, and that the floating dock should be declared to be in no way liable, or in any way affected, for the payment of any rent which might be due by Defendant to Plaintiff, the principal lessor; that *main-levée* of the seizure should be granted them. The intervention was contested by Plaintiff, by a perpetual peremptory exception, the allegations of which were: that the lease from Plaintiff to Defendant was made upon the express condition that Defendant should not assign or make over his rights to the lease to any person, without the actual consent and approbation in writing of Plaintiff, except only to certain persons mentioned in the lease, to whom alone Defendant was allowed to sublet the premises; that, at the time of the making of the attachment, the amount claimed was actually due by Defendant; that the floating dock seized had, for many years, continuously lain on and garnished the premises leased, and, moreover, was the only security which Plaintiff had for the payment of his rent; that, if the intervening parties were the lessees of Defendant, as alleged by them, they were such in direct violation of the before cited clause that Defendant should not sublet, and could not consequently claim or derive any advantage from such sublease; that Defendant was and had, for a long time, been insolvent, and that the intervening parties were aware of it; that, even if the intervening parties had obtained an assignment of the lease, any effects belonging to them which

were in the shipyard and premises, and which served to garnish the same would be affected to, and liable for, the payment of the rent thereof.

ANDREWS, for intervening parties, contended that his clients had paid their rent to Defendant, whose tenants they were, according to the stipulations of their lease with him previously to the making of the attachment at the instance of Plaintiff; and he further contended that, by the 162nd article of the *Custom of Paris*, the effects of subtenants could be seized only for the rent of the part which they occupied, and would be restored upon proof by them that they had paid their rent in good faith to their immediate landlord. This he argued was the case in the present instance, and his clients were therefore entitled to obtain *main-levée* of the attachment made. He also contended that, inasmuch as Plaintiff had allowed eight days, from the time the rent fell due, to elapse before taking proceedings against Defendant, and that, on the 1st of May, the intervening parties ceased to be the tenants of Defendant, and had become the tenants of Plaintiff himself, his rights, if any he had ever had, were thereby forfeited. (1)

LAMPSON, for Plaintiff, said that the delay of *eight* days alluded to referred to the time allowed by law to a landlord to exercise his *droit de suite*,, in case the tenant had removed the effects garnishing the premises, but was wholly inapplicable to the present cause, as the floating dock seized had not been removed, but, on the contrary, was still on the premises. With respect to a subtenant's right to obtain *main-levée* of a seizure, upon proof of payment of his rent in good faith to his immediate landlord, he thought that this right, if it existed at all, about which there was considerable doubt, applied only to cases of *sous-location partielle*, and especially to houses which had perhaps been sublet room by room to different parties, who in that case might say with some reason that it would be unjust to make their effects liable for the payment of the rent of the whole house. But, in the present instance, what were the facts, why, it was found that the whole property was sublet, or, in other words, Defendant assigned his lease to the intervening parties, for, on examination, it would be seen the descriptions of the property in both leases exactly corresponded, but, in the first lease, the annual rent was £200, while in the second it was only £150. Now, was it right that a tenant should make over his lease to a third party, at a less rent than he himself agreed to pay, and

(1) *Code Civ. du Can.*, Liv. 3, pp. 84 et 85, par. 17, 18, 19; *Cout. de Paris*, art. 162; 1 Pothier, *Louage*, No. 235; Argou, vol. 2, p. 288; C. L. 2676; C. N. 1753; C. P. 820.

thus deprive his landlord of the difference? If this were the law, what security would property have? Clearly none: a dishonest person might take properties at a high rate, immediately sublet it for little or nothing, and the landlord (proprietor) would be entirely without remedy. It was evident that the law never contemplated countenancing such an unjust proceeding. It would also be remarked that, in the lease from Plaintiff to Defendant, there was an express clause that Defendant should not sublet without Plaintiff's consent, that Defendant did sublet in direct violation of this clause, and it was evident that the intervening parties were fully aware of this clause and intended to set it at defiance, for there was in the sublease a clause to the effect that the intervening parties might make use of Defendant's name against Plaintiff to carry out the sublease. In this case also, it would be borne in mind that Defendant was insolvent, and it was clearly the duty of the intervening parties, before paying him their rent, to ascertain if Plaintiff's claim had been satisfied. (1)

TASCHEREAU, Justice: This is a case involving the question of a landlord's privilege upon the effects of a subtenant garnishing the property leased to the principal tenant. The Defendant is the tenant from Plaintiff of a shipyard, the intervening parties are subtenants of the same property, having taken a lease of the whole from Defendant. I may state that in the lease from Plaintiff to Defendant there was a clause by which it was stipulated that Defendant should not sublet without the express consent in writing of Plaintiff, except to certain persons mentioned in the lease. Now, the intervening parties must be presumed to have been aware of this clause, and, leasing as they did from Defendant in direct violation of it, must be held responsible for the consequences. The intervening parties claim that, by the 162nd article of the custom of Paris, they are entitled to have *main-levée* of the seizure of the floating dock, inasmuch as they have paid their rent in good faith to Defendant, their immediate landlord, and, inasmuch as, at the time of making the seizure, there was no rent due by them. In support of this assertion, they cite the case of *Wilson* vs. *Pariseau* and *Barrette*, (2) in which

(1) Poth., *Traité du Louage*, No. 241; *Rep.*, de Guyot, vbo. *Bail*, sec. 7.

(2) L'article 162 de la *Coutume de Paris* se lit comme suit: "S'il y a des sous-locataires, peuvent être pris leurs biens pour le dit loyer et charge du bail, et néanmoins leur seront rendus en payant le loyer pour leur occupation." Jugé que cet article ne s'applique pas au cas du sous-locataire de tous les lieux loués, qu'il aurait sous-loués au mépris d'une prohibition contenue dans le premier bail qu'il connaissait; cet article ne s'applique qu'au cas d'une sous-location partielle. (*Wilson* vs. *Pariseau*, et *Barrette*, Intervenant. C. S., Montréal, 3 mai 1856, DAY, J., SMITH, J., et MONDELET, J., 5 *R. J. R. Q.*, p. 66.)

this doctrine would seem to have been acquiesced in by the Honorable Judges who decided that case: but, however much I may be inclined to respect the opinion of those Honorable Judges, I cannot come to the conclusion that the 162nd art. of the Custom of Paris ought to be interpreted in that sense. The words of the article are: "S'il y a des sous-locataires, "peuvent être pris leurs biens pour le dit loyer et charges du "bail, et néanmoins leur seront rendus en payant le loyer "pour leur occupation." Now, as I look upon it, this article clearly seems to say that the effects of subtenants will be restored them on payment of the rent for that part of the premises which they occupy, not, as attempted to be made out in this case, on proving that they have paid their rent to their immediate landlord. But, in addition, in this case, the intervening parties are subtenants for the whole at a less rate than Defendant agreed to pay Plaintiff, Defendant having taken the property for £200 a year, and the intervening parties at £150, thus making a difference of £50 a year. Now, it is quite clear that, when a subtenant takes the whole at a less rent, the proprietor must have a *lien* upon the effects garnishing the premises for the payment of the whole rent. This principle is laid down by the authors treating of this subject, for example, Pothier, in his *Traité du Louage*, and Ferrière, Grand Coutumier, Commentaire on the 162nd article. It is also to be remarked that Defendant is, and, for a long time, has been, notoriously insolvent, and the intervening parties ought, before paying the rent, to have ascertained if Defendant had satisfied Plaintiff's demand against him. The judgment dismisses the intervention and declares the seizure good and valid. (13 *D. T. B. C.*, p. 365.)

LAMPSON, F., for Plaintiff.

ANDREWS and ANDREWS, for intervening parties.

DROIT DU PROTONOTAIRE DE RECEVOIR UN CAUTIONNEMENT.

SUPERIOR COURT, Quebec, 5 octobre, 1863.

Before: STUART, Justice.

THE CANADIAN INLAND STEAM NAVIGATION COMPANY *vs.* REIFFENSTEIN.

Jugé: Que le protonotaire n'a le droit de recevoir aucun cautionnement, si ce n'est les cautionnements en appel.

The Plaintiff brought suit against the Defendant for the recovery of the sum of $403.42, claimed from Defendant for the following reasons: In the month of May, 1862, a writ of

revendication issued at the suit of Jarvis against The Richelieu Company, and the effects sought to be revendicated were seized by the sheriff; the effects seized being actually the property of Jarvis, but retained by The Richelieu Company, for a claim, *lien*, upon them, which the company had; Jarvis petitioned for and obtained an order from one of the judges of the Superior Court, that the effects seized should be delivered up to him, upon his giving good and sufficient security to pay to The Richelieu Company such amount as might be awarded them. (1) Upon this order, Defendant, and one Harrington, entered into a judicial bond, before Fiset and Burroughs, joint prothonotary of the Superior Court for the district of Quebec, that they would pay to The Richelieu Company all such sums of money as Jarvis should be condemned to pay. The Canadian Inland Steam Navigation Company, afterwards, intervened and took up the *instance* for Defendant, the Richelieu Company, whom they alleged to be their agents. Judgment was afterwards rendered in favor of The Canadian Inland Steam Navigation Company, and Jarvis was condemned to pay to the company the sum of $403.42, for principal, interest and costs, this sum the company being unable to collect from Jarvis, who had obtained possession of the goods and effects revendicated, now sought to recover from the present Defendant in virtue of the judicial bond above referred to. The Defendant pleaded, that the prothonotary of the Superior Court had no authority to take the bond upon which Plaintiff's action was founded, and that the bond was not legal; Defendant further pleaded that he could only be condemned for half the amount claimed from him. inasmuch as one Harrington had also signed the bond in question, and was bound to pay one half of the amount claimed.

LANGLOIS, for Plaintiff: As to the power of the prothonotary to receive the bond, there can be no doubt, for, on referring to the con. stat. L. C. chap. 77, sec. 30, it will be seen that the prothonotary has the power to receive all bonds.

HEARN, for Defendant, referred the Court to the Con. Stat. L. C., cap. 78, sec. 23, where the powers given to the prothonotary were detailed, and argued that, by that act, the prothonotary had not the power to receive the bond in question, and that the cap. 77, sec. 30 of the same statutes, referred to by Plaintiff's attorney, could not be made to apply to this case, as that act referred entirely to questions of appeal.

STUART, Justice: The principal question in this cause arises out of Defendant's demurrer to the declaration. The Plaintiff sued on a bond, signed by Defendant, and another, in favor

(1) V. art. 515 et 869 C. P. C.

of The Richelieu Company, given for the security of The Richelieu Company, in a suit in revendication brought by one Jarvis against the said Company. The Defendant demurred to this action and assigned several good reasons why Plaintiff could not succeed, the first and principal one being that the bond, on which the Plaintiff's action was founded, was not a legal bond, and that the prothonotary of the Superior Court, before whom the bond was given, had not by law the power to take or receive the same. I think this objection is valid, the prothonotary has the power given him by the statute to receive bonds in appeal, but none others.

JUDGMENT: *Défense au fonds en droit* maintained, and action dismissed with costs. (13 *D. T. B. C.*, p. 370.)

CASAULT, LANGLOIS and ANGERS, for Plaintiff.

HEARN, for Defendant.

ENREGISTREMENT.—FAILLITE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 15 juin, 1863.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET, and BERTHELOT, Justices.

ANDERSON, et al., Appellants, and GÉNÉREUX, Respondent.

N. C. F., le 6me novembre, 1856, consentit une obligation au profit des Appelants, qui fut dûment enregistrée le 8me jour du même mois; pour sûreté du montant dû, N. C. F., hypothéqua certaines propriétés immobilières, qui passèrent subséquemment entre les mains de l'Intimé. Les Appelants portèrent une action contre l'Intimé; l'Intimé plaida que N.C.F., était en faillite et en déconfiture le 17 novembre, 1856, et que l'enregistrement de la dite hypothèque le 8 novembre, était inefficace en autant que cet enregistrement avait été fait moins de dix jours avant la date de la déconfiture:

Jugé: Que, dans l'espèce, la déconfiture plaidée n'était pas suffisamment établie.

Il semble: Qu'une personne peut être insolvable sans être en état de "Banqueroute" d'après la signification du mot "Banqueroute" tel qu'employé dans la 18me section de l'ordonnance des enregistrements, 4 Vic., cap. 30, (Stat. Ref. B. C., cap. 37, sect. 7, p. 345,) les mots banqueroute et insolvabilité n'étant pas en loi synonymes; et qu'en conséquence, sous les dispositions de l'ordonnance des enregistrements, l'enregistrement d'une hypothèque ne serait pas considéré inefficace en raison de son enregistrement dans les dix jours avant l'insolvabilité du débiteur. (1)

The action in the Court below was *en déclaration d'hypotheque* against Respondent, the vendee and possessor of two immoveable properties acquired by him *à titre de propriété*, from Narcisse Constantin Faucher, by whom they had been

(1) V. art. 17, § 23 et art. 2090 C. C.

hypothecated in favor of Appellants. The defence set up was, substantially, that, at the time Appellants first acquired their hypothec on one of these properties, Faucher, held it *à titre de bail* or *emphytéose* and that when this hypothec was renewed under a second deed (Faucher being then the absolute proprietor) it was, in so far as the registration of this deed was concerned, within ten days of his (Faucher) becoming insolvent, and that, in consequence, the Appellants had no claim. The court below maintained this view. It was said for Appellants: The Appellants' declaration alleges, that, by deed of obligation passed at Quebec, before DeFoy and colleague, notaries, on the 5th June, 1849, Faucher acknowledged that he was indebted to Ursule Luce Lagueux, in the sum of £3,100, which he undertook to pay in ten years, with interest at 6 per cent. To secure payment, he thereby hypothecated, among others, the two properties mentioned in the declaration, namely those described in the deed as lots Nos. 4 and 8, the first of which was declared by him to be held *à titre d'emphitéose*, the term of which would expire on the 13th November, 1856. That, by a deed of agreement, executed at Quebec, before Campbell and colleague, notaries, on the 23rd January, 1855, Appellants agreed to advance Faucher £2,000, on certain conditions. The Appellants made these advances. Dame Lagueux was an intervening party to this deed; and, thereby, she ceded, transferred and made over to Appellants the sum of £2,000 with interest from date 23rd January, 1855, being a part of the sum of £3,100 due her by Faucher, under deed of 5th June, 1849. By this same deed, it was stipulated that Appellants should be priviledged upon the obligation by Faucher to Dame Lagueux for the amount of their advances, and should be paid in preference to her, Faucher being obliged to pay them instead of Dame Lagueux in one year from date of agreement, this sum of £2,000, with interest. That, by another deed of obligation, executed on the 6th November, 1856, to which Appellants and Faucher were parties, it was declared that Appellants had duly made the advances they were to make, and that the amount thereof, with interest and commission, amounted to £2154 6s. 7d., which last mentioned sum was still due and owing to Appellants by Faucher, and that Dame Lagueux had subrogated Appellants in her rights as above stated: and that, as the hypothec in favor of that lady would expire on the 13th November, 1856, Appellants were desirous of preserving their hypothec by means of a new registration upon the property formerly held *à bail emphytéotique*, and of which Faucher had since become proprietor, and, thereupon, for the greater security and guarantee of the payment of the amount due

Appellants, with interest; and *without novation* or *derogation* whatever from the acquired rights of Appellants, Faucher specially hypothecated in favor of Appellants the property therein mentioned, (being that first described in the declaration of the latter.) It is contended, on the part of Appellants, that Respondent cannot legally set up as a defence against them the alleged rights of Faucher's creditors. When *they* contest Appellants' claims, the latter will meet them. Faucher could not avail himself of fraud on his own part, had he committed any; neither can Respondent claiming solely under Faucher, and possessing his rights only, do so. Apart from this, Respondent's *sole* title to the properties in question is derived from the deed of sale by Faucher to him; and the express consideration of that sale is, that Respondent was to pay Appellants the sum therein stated, for which, states the deed, they have their hypothec on the property so sold. In addition, Respondent himself in the notice which he gave of his intended application for confirmation of the purchase, states expressly that he purchased the properties subject to the claims mentioned in the deed of sale to him, the same being, he says, *des hypothèques premières et privilégiées* in favor of the persons therein named, among whom are specifically mentioned Appellants as having the *première hypothèque légale, après la dernière ci-dessus mentionnée, sur les dits immeubles en question.* The Respondent takes possession of the property subject to Appellant's hypothec, and undertakes to pay it, and when reminded of his obligation in the form of an action by Appellants, he denies their right. But, apart from all this, Appellants assume still higher ground. The Respondent contends that the hypothec given by Faucher on the property, while held by him *à titre de bail or emphytéose*, became extinct, notwithstanding that, previously to the expiration of the *bail*, and while the hypothec was still in full force, Faucher himself acquired the *propriété* of the immoveable by deed of sale. To admit this doctrine would be to afford every possible incentive to dishonest courses. The Appellant's position is however not even dependent upon the decision of this question. for it is a fact, that, on the 23rd January, 1855, when the first deed was entered into between them and Faucher, to which Dame Lagueux was an intervening party, and made over to Appelants the sum of £2,000 already mentioned, with her hypothec, on the property as security, to which hypothec Faucher consented, he, Faucher, was the actual *proprietor* of the immoveable in question, so hypothecated, having acquired the same on the 19th September, 1854. The deed of the 23rd January, 1855, declares that Faucher was *proprietor;* and the deed itself amounts to

a perfect hypothec granted on that day. A hypothec sufficient to maintain Appellant's claim, if the dees of the 6th November, 1856, be not so.

Le jugement de la Cour de première instance en faveur de l'Intimé, est motivé comme suit: " La Cour, considérant que de l'aveu des Demandeurs mêmes, contenu en l'obligation consentie en leur faveur par Narcisse Constantin Faucher, le 6 novembre 1856, à Québec, devant Campbell et son confrère, notaires, l'hypothèque constituée par Faucher, sur des immeubles tenus par lui à titre d'emphytéose, au désir des actes relatés par les Demandeurs dans leur demande, expirait le 13 novembre 1856 : et, attendu que la nouvelle hypothèque établie par la dite obligation, et constituée par Faucher sur les mêmes immeubles, dont il était, le 6 novembre 1856, devenu propriétaire incommutable, n'a été enregistré au bureau d'enregistrement de la division d'enregistrement des Trois-Rivières que le 8 novembre 1856, et que le 17 du mois de novembre 1856, Faucher était dans un état de banqueroute, déconfiture et insolvabilité, en sorte que le dit enregistrement n'a pu produire aucun effet, et n'a pu nommément engendrer aucun droit d'hypothèque au profit des Demandeurs sur la propriété acquise par le Défendeur de Faucher, maintient l'exception perpétuelle péremptoire en droit plaidée par le Défendeur, pour autant qu'elle est fondée sur des moyens conformes aux considérants du présent jugement, et, en conséquence, déboute l'action des Demandeurs."

HAMEL, for Respondent : Il résulte de ce jugement que les deux points en contestation sont : 1° que l'hypothèque créée en premier lieu a cessé avec l'existence du bail emphitéotique ; or ce fait est allégué par le Demandeur lui-même dans son action, en disant que ce bail emphitéotique est expiré le 13 novembre 1856. 2° Que, lors de la seconde hypothèque, Faucher était insolvable et en banqueroute. Cela est prouvé par les deux seuls témoins entendus dans la cause. Faucher avait alors la qualité de commerçant de bois, et l'objet de l'obligation hypothécaire était d'une nature commerciale. Ces deux points paraissent si clairs qu'il n'est pas nécessaire de les commenter.

MEREDITH, Justice : The Appellants, by their opposition in the Superior Court, claimed a hypothec upon the real estate of Defendant, (now Respondent) as well under the deed of the the 5th June, 1849, as under the deed of the 6th November, 1856 ; but, at the argument, the learned counsel of Appellant abandoned the claim under the first of those deeds ; as that claim, for the reasons adverted to at the argument, could not possibly have been maintained. I shall, therefore, confine my attention to the hypothec claimed under the deed of the 6th November, 1856. That deed was registered two days after it

bears date, viz: on the 8th November, 1856, and Respondent pleaded that N. C. Faucher, by whom the hypothec of the 6th November, 1856, was created, was *en faillite et en déconfiture* on the 17th November, 1856; and therefore that the hypothec so created in favor of Appellants, and registered on the 8th of November, 1856, was null, as having been registered less than ten days before the date of the *déconfiture* of the debtor who created the hypothec. This pretension of Respondent, which has been sanctioned by the judgment of the Superior Court, at Three Rivers, is based upon the eighteenth section of the registry ordinance, 4th Vict., ch. 30 (C. S. L. C., ch. 37, sec. 7, p. 345), which is in the following words: " The regis- " tration of hypothecs and hypothecary rights and claims " made within the ten days next before the bankruptcy of " the debtor, shall give no priority to the registering creditor " over other creditors, or produce any effect whatever." I agree with the learned judge of the Superior Court, in thinking that the insolvency of Faucher by whom the hypothec in question was granted, is proved as alleged; and, if so, then the decision of the present case must depend upon the meaning of the word *bankruptcy* in the provision of law just cited. The word " bankruptcy," so used, must, I think, be understood as meaning, either the state of a trader made bankrupt, under the provisions of the bankruptcy ordinance (2 Vict., ch. 36) passed a short time before, and then in force; or it, viz: the word " bankruptcy " must be understood as equivalent to the word insolvency. In considering the provisions of the registry law, it is necessary to bear in mind that the original text of that law is in english, and that the english terms " bankruptcy " and " insolvency " in legal phraseology, not only are not synonymous, but are used in contradistinction to each other. Bankruptcy, as a law term, means " the state and condition " of being a bankrupt," (1) and the word bankrupt, according to judge Bouvier's valuable law dictionary means: " a person who has done or suffered some act to be done, which is by law declared an act of bankruptcy." Whereas insolvency, as defined by Burrill, is " the state of a person not engaged in trade not able to pay his debts;" and the author adds: " This is the sense of the word in the english law, as distinguished from bankruptcy." Accordingly, we find that the special council, which counted among its members several of the ablest english lawyers in the province, in the framing of the bankrupt ordinance distinguished as clearly as possible between insolvency and bankruptcy; for, under that ordinance, a trader committing an act of bankruptcy, as defined by the 2nd

(1) Burrill, *Law dictionary* vs. *Bankrupcy*.

section of the ordinance. was liable to be made a bankrupt, however much his assets might have exceeded his liabilities; and, in accordance with the same principle, no trader was liable, under the ordinance, to be forced into the bankrupt court, merely on the ground of insolvency. In other words, under the bankrupt ordinance, on the one hand, proof of solvency was not enough to prevent a trader from being made a bankrupt; and, on the other hand, proof of insolvency was not sufficient to cause a trader to be made a bankrupt. The special council having thus carefully distinguished between insolvency and bankruptcy, in framing the bankrupt ordinance, cannot be supposed, in the registry ordinance, to have used the word "bankruptcy" as meaning merely insolvency. It may further be observed that the provision of the registry law under consideration is one of a peculiarly exceptional character. It causes the binding effect of a deed taken as security to depend, not on the sufficiency of the consideration given by the creditor, nor upon the good faith of the creditor, or of the debtor, or of both, but upon the state of the affairs of the debtor a certain number of days after the passing of the deed sought to be enforced: such a provision may be necessary in a particular class of cases, but opposed, as it doubtless is, to the general principles of our law, it ought not, I think, to be extended beyond the plain meaning of the words in which it is framed. Moreover, if the word "bankruptcy" in the section under consideration is to be understood as meaning merely insolvency, then, according to the terms of the law, it would apply as well to the case of an insolvent debtor not engaged in trade, as to the case of an insolvent trader. Now according to the general principles of our law, mere insolvency does not deprive the owner of real estate of the power of hypothecating it; and our law in this respect is right; for, insolvency which renders it necessary for a debtor to dispose, in good faith, of his property for the benefit of his creditors, cannot, in the absence of special legislation, have the effect of depriving the debtor of the power of doing that which it renders necessary to be done. Troplong says: "Jamais dans l'ancienne jurisprudence, il n'avait été "défendu d'acquérir privilége ou hypothèque sur les biens "d'un individu non négociant en état de déconfiture." (1) Whereas, if the provisions of the registry law under consideration are to receive the interpretation contended for by Respondent, it would be impossible for an insolvent debtor, in good faith, and for the benefit of his creditors generally, to

(1) 3 Troplong, Priv. et Hyp. No. 661, p. 49; Vide also 1 Persil, Priv. et Hyp., p. 257; 1 Grenier, Traité des Hyp. No. 123.

hypothecate his property effectually. Such a change of our law would be one, I need hardly observe, of very great importance, and had the legislature been disposed to make it, there cannot, I think, be any doubt that it would have used language much more explicit then that which is to be found in the 18th section of the registry ordinance. In conclusion, I may observe that the unreasonableness of the rule contended for by Respondent, is, in one respect, well illustrated in the present case, in which Respondent argues that the sale made to him by Faucher, after his alleged insolvency, is valid, whilst, at the same time, he alleges that a hypothec previously created, by Faucher, upon the same property, is of no effect; not because Faucher was insolvent when that hypothec was granted, for that is not alleged, but because the registration of the hypothec was made within ten days next before the *déconfiture* of the debtor, Faucher. For these reasons, I am of opinion that the word "bankruptcy" in the 18th section of the registry ordinance, is to be understood as bankruptcy within the meaning of the bankrupt ordinance, (1) and the subsequent laws of this province on the same subject; and I am further of opinion that, as the debtor, Faucher, never was in bankruptcy, in the sense of that word just mentioned, Respondent was not entitled to derive any benefit in this cause from the said 18th section of the registry ordinance; and, therefore, I cannot avoid the conviction that Appellants are entitled to the relief which they claim by a reversal of the judgment of the court below.

Mr. Justice AYLWIN, Mr. Justice DUVAL and Mr. Justice BERTHELOT, declared that they also were of opinion that a hypothec could not be held inoperative, on the ground of its having been registered less than ten days before the *déconfiture* of the debtor, but, in the present case, they thought the *déconfiture* of the debtor was not established, and made that the *considérant* of the judgment in appeal.

The judgment of the Court of Appeals is as follows: "Considérant, que, par l'acte d'obligation du 6 novembre, 1856, reçu devant Campbell et son confrère, notaires, à Québec, Narcisse Constantin Faucher, nommé dans la déclaration et les plaidoyers, s'est, là et alors, dans et par le dit acte, reconnu endetté aux Appelants, en une somme de deux mille cent louis, avec intérêt sur icelle, à compter du 23 de janvier, 1855, aux termes d'un marché et contrat intervenu entre les Appelants, d'une part, et Fauché, d'autre part, fait et reçu le 23 de janvier, 1855, par devant Campbell et confrère, notaires, pour la sûreté du

(1) "*Analyse sur l'ordonnance des bureaux d'hypothèque*" by Sir L. H. LaFontaine, page 72, No 1; See also *Bonner's essay*, page 129, No. 196.

paiement de laquelle somme, avec intérêt il a, par le dit acte d'obligation, du 6 novembre, 1856, affecté et hypothéqué l'immeuble y désigné, comme suit, savoir : " Une terre sise et située " dans le fief GrosBois, dans la paroisse de Ste. Anne, etc." duquel immeuble le Défendeur était en possession à titre de propriétaire dès avant la signification qui lui a été faite de la présente action, et ce pour l'avoir acheté de Faucher, par acte de vente du 27 février, 1857, reçu devant Bourassa et son confrère, notaires, et qu'une copie authentique du dit acte du 6 novembre, 1856, a été enregistrée le 8 novembre, de la même année, au bureau d'enregistrement des Trois-Rivières, dans les limites duquel le dit immeuble est sis et situé. Considérant qu'il n'y a pas de preuve légale et suffisante qu'au jour de l'enregistrement de la constitution d'hypothèque du six novembre 1856, par Faucher, ce dernier fût en faillite, insolvable ou en déconfiture, et que la dite hypothèque et l'enregistrement d'icelle ont été reconnus par le Défendeur, lors de l'acquisition qu'il a faite de l'immeuble ci-dessus désigné de Faucher, et que la somme de deux mille cent louis, est encore due par ce dernier aux Appelants, avec intérêt sur icelle à compter du 23 janvier, 1855, et que, par conséquent, ils ont un recours hypothécaire contre l'Intimé pour le recouvrement de la dite somme et intérêts, a déclaré le dit immeuble affecté et hypothéqué au paiement de la somme de deux mille cent livres, et a condamné et condamne le dit Intimé, comme propriétaire en possession d'icelui, à payer aux Appelants la dite somme de deux mille cent louis, avec intérêt sur icelle depuis le 23 janvier, 1855, jusqu'au parfait paiement, et les dépens, si mieux n'aime, etc. (13 *D. T. B. C.*, p. 374.)

POPE, pour les Appelants.

TESSIER, ROSS et HAMEL, pour l'Intimé.

VENTE.—DELIVRANCE.

BANC DE LA REINE, EN APPEL, Montréal, 1 juin, 1863.

Présents : AYLWIN, MEREDITH, MONDELET et BERTHELOT, Juges.

McVEIGH, Appelant, *et* LUSSIER, Intimé.

Jugé : En Cour Supérieure, que dans une vente de plusieurs lots de terre, pour un seul prix *en bloc*, le défaut de livraison d'un lot ne donne lieu qu'à une diminution du prix proportionnelle au nombre des lots vendus, sans égard à la plus value du lot non livré, à défaut de preuve de mauvaise foi ou de faute de la part du vendeur.

En appel, que, dans l'espèce, l'acquéreur a droit à une diminution du prix de vente équivalant à la valeur du lot qui n'a pas été livré. (1)

(1) V. art. 1501, C. C.

L'Intimé, Demandeur en Cour Supérieure, avait vendu à l'Appelant, le 12 juillet, 1852, Labadie, notaire, les lots de terre suivants, situés dans le township de Litchfield, dans le comté d'Ottawa, savoir les lots Nos. 12, 27 et 28 dans le 1er rang, le lot No. 22 dans le 3e rang, et le lot 20 dans le 4e rang, contenant en tout 934 acres de terre, moyennant £140, dont £70 payés comptant, quant à la balance elle était payable dans 12 mois, sans intérêt. L'action du Demandeur était en recouvrement de cette somme de £70, avec intérêt *ex natura rei*, du 12 juillet, 1853. A cette action, le Défendeur plaida qu'il n'avait jamais pu avoir la possession du lot No. 22 dans le 3e rang de Litchfield ; que ce lot était d'une grande valeur, que cette valeur excédait la somme de £250, étant la perte soufferte par le défendeur faute de possession de ce lot, et il demandait que les dommages fussent imputés sur la somme réclamée. Puis demande incidente pour £150. Le Demandeur répondit spécialement que le Défendeur aurait pu être mis en possession de ce lot ; qu'il avait poursuivi un nommé Thompson, devant la Cour d'Ottawa, pour l'en faire déguerpir, mais qu'il avait, sans raison, abandonné cette action, ou du moins ne s'en était pas occupé ; que le Défendeur ayant acheté 934 acres de terre avait droit de demander une diminution proportionnelle du prix, pour le lot qui lui manquait, mais qu'il ne pouvait réclamer un montant plus élevé que cette valeur proportionnelle du prix d'achat. La Cour Supérieure rendit jugement le 27 mars, 1862. Ce jugement est rapporté dans 10 *R. J. R. Q.*, p. 258.

ROBERTSON, pour l'Appelant : It is submitted on behalf of Appellant that there is error in the judgment appealed from : 1° In deducting simply the sum of £28 from the *prix de vente*, without regard to the *value* of the lot not delivered. The Appellant was entitled to damages proportioned to the value of this lot, as compared with the value of the lots delivered. These damages might have been estimated by experts named by the Court, and should have been based upon the actual damage suffered, including the value of the lot not delivered, at the date of the *expertise*, with any ameliorations upon it. 2° In awarding interest upon the balance of the *prix de vente*, notwithstanding an express agreement in the deed of sale, that the balance of seventy pounds was payable " without interest." 3° In overruling the exceptions, and dismissing them and the incidental demand with costs, the exception being in part, at least, well founded, as admitted by the judgment and being contested *in toto* by Plaintiff's answer. An order for an *expertise* should have been made to ascertain the *value* of the lot not delivered, as well as the amount of damages suffered by Defendant.

OUIMET, pour l'Intimé : La vente par Lussier à McVeigh est

une vente d'une contenance générale, pour un prix total, une vente *en bloc ;* je vous vends 934 acres de terre, dit Lussier, je ne vous désigne pas les lots, je ne spécifie pas la contenance de chaque lot en particulier, je ne donne pas les tenans et aboutissans, je vous vends 934 acres divisés et connus par lots. L'Intimé n'a pas eu possession du lot No. 22 du 3me rang. La question est donc de savoir, si, dans l'espèce, l'Intimé doit rembourser à l'Appelant, la valeur réelle du lot tel que l'Appelant la fixe, ou bien cette valeur se calcule-t-elle, en proportion du prix de vente total, et doit-elle être de £28, un *cinquième* du prix, puisqu'il manque un cinquième de la contenance ; et, de plus, Lussier est-il tenu aux dommages et intérêts, faute de livraison de ce lot ? Le vendeur est tenu de livrer la chose vendue, et à défaut par lui de le faire, l'acquéreur peut exercer contre son vendeur l'action *ex empto*, pour se faire mettre en possession de la chose vendue qui lui manque, ou pour se faire rembourser le prix payé, et même, dans certains cas, les dommages soufferts. L'Intimé avait acheté ces 934 acres de terre à une vente faite par le Shérif du district de Montréal sur l'hon. Louis Massue. Cette propriété est située à plus de 30 lieues de Montréal, et M. Lussier ne la connaissait pas quand il l'a achetée. Il résulte de la preuve faite que quand M. Lussier est allé la visiter, avant de la vendre à l'Appelant, c'est ce dernier, résidant sur les lieux, qui la lui a montrée, mais il n'a pas indiqué à M. Lussier la partie du lot No. 22, en possession de Thompson. L'Intimé n'a jamais connu que partie du lot 22 fût en la possession d'un tiers, en sorte que sa vente a toutes les couleurs de la bonne foi. L'Intimé ne peut donc être tenu à aucun dommage, et cette question de dommages se trouve entièrement écartée par la bonne foi du vendeur. L'Appelant a poursuivi ce nommé Thompson en déguerpissement, et son action est encore pendante. Il est évident que McVeigh savait, lors de son achat, que Thompson détenait ce lot, et, qu'en l'achetant de Lussier, il faisait sa propre affaire de l'obliger à le délaisser à son profit. Pourquoi n'a-t-il pas continué son action ? L'intimé ne peut donc être tenu qu'à faire une diminution proportionnelle du prix d'achat, c'est-à-dire, qu'il manque un cinquième du terrain vendu, et que la valeur s'établit sur la valeur de la contenance, savoir un cinquième du prix. Cinq lots ont été vendus, il en manque un, le vendeur n'est tenu qu'à la remise d'un cinquième du terrain qui manque ; cette proposition est claire et bien définie en loi. Mais, dit-on, le lot en question vaut à lui seul plus que tout le reste, et, sans cette circonstance, l'Appelant n'aurait pas acheté. Cela peut-être, mais tournons la thèse, et supposons que le lot fût inférieur en valeur au cinquième du prix, est-ce que McVeigh n'aurait pas

eu le droit d'exiger une diminution d'un cinquième de son prix, et que Lussier n'aurait pu prétendre ne faire déduire que la stricte valeur du lot ? Supposons qu'au lieu de valoir £28, le lot No. 22 ne vaudrait que £5, dirait-on que Lussier ne serait tenu que de remettre les £5, et non un cinqnième du prix, et qu'il ne pourrait pas opposer cette différence dans la valeur du lot, et que l'acquéreur ne pourrait pas exiger le remboursement du cinquième du prix ? non, telle n'est pas la loi. Il y a plusieurs autres considérations qui aident la discussion ; ainsi, l'Intimé n'a jamais été mis en demeure de livrer ce lot, l'Appelant ne lui a jamais fait d'offres réelles, n'a pas consigné la balance de son prix de vente ; cela seul suffirait pour faire repousser sa prétention. De quelque côté que l'on examine cette question, vu les circonstances, elle se résout favorablement à l'Intimé. L'acquéreur, vu le défaut de contenance dans le terrain vendu, pouvait opposer à son vendeur l'action *quanto minoris*. Cette action a pour effet de faire diminuer le prix de vente, en proportion de l'étendue du défaut de contenance, mais toujours en ayant égard au prix total. L'Appelant ne peut prétendre garder la propriété des autres lots pour rien sans en payer la valeur, ce qui aurait lieu si sa prétention était maintenue. Lussier a acquis cette propriété du shérif, il a son garant dans la personne du créancier qui a reçu le montant du prix de l'adjudication. Ce créancier est la Banque de Québec qui a fait vendre les lots sur l'hon. M. Massue. Or, la seule action de Lussier contre la Banque serait une action *quanto minoris*, comme dans la cause de *Desjardins* et la *Banque du Peuple*, jugée par cette cour le 31 mai 1860, (1) Lussier ne pourrait faire condamner la Banque qu'à refondre l'excédant du prix, eu égard au déficit et au

(1) Un immeuble vendu par le shérif et désigné comme suit : "Une terre contenant quatre cents arpents, c'est-à-dire, tout ce qui peut se trouver dans les limites suivantes, à partir de la ligne de J. M., au sud-ouest, suivant le bras de la rivière séparant l'Ile Perrot de l'Ile de Montreal, et s'étendant au Nord-est, au terrain des représentants T., de là, allant dans une direction sud-est, le long de la ligne des représentants T., jusqu'à l'intersection de la dite ligne avec celle de J. L," est une vente *ad mensuram, non ad corpus*, et, si l'immeuble n'a pas l'étendue mentionnée, le dernier créancier qui est colloqué sur le produit de la vente est tenu de remettre à l'adjudicataire le montant de sa collocation, en proportion du déficit qu'il y a dans la contenance, et, dans une action par l'adjudicataire contre ce créancier colloqué, pour se faire rembourser de la partie de sa collocation, correspondante à l'étendue du terrain manquant, il n'est pas nécessaire de mettre en cause le saisi ni le créancier poursuivant. [Desjardins et la Banque du Peuple, C. B. R., en appel, Montréal, 31 mai, 1860, LAFONTAINE J. en C., AYLWIN, J. [dissident], DUVAL J. [dissident] MEREDITH, J. A., et BADGLEY, J. A., renversant le jugement de C. S., Montréal, 31 décembre, 1858, SMITH, J., qui avait jugé que l'adjudicataire n'avait pas droit d'action contre le créancier ainsi colloqué avant d'avoir fait corriger son titre du Shérif lui donnant une contenance plus grande que celle que l'immeuble avait réellement, et sans mettre en cause le saisi et le créancier poursuivant l'exécution. 7 R. J. R. Q., p. 135 et 139.]

défaut de contenance, mais rien de plus. D'ailleurs, la preuve offerte est loin d'être satisfaisante, même sur la valeur du lot No. 22, et il existe sur ce point une indécision et un doute qui repousse une estimation de plus d'un cinquième. L'Appelant ne fait pas preuve de la valeur lors de la vente, et ce serait la seule valeur dans tous les cas qu'il pourrait avoir. Pourquoi l'Appelant n'offrait-il pas de remettre les 4 autres lots à l'Intimé, en par ce dernier lui remettant les £70 qu'il avait reçus. Si l'Appelant n'avait acheté les 934 acres qu'avec le désir et l'intention de devenir propriétaire du lot No. 22, qu'il prisait alors à une grande valeur, pourquoi ne demandait-il pas la résiliation de l'acte du 12 juillet 1852, pour la raison qu'il y avait une erreur sur le motif déterminant de l'acquéreur, ayant acheté une grande étendue de terrain, mais avec le seul motif d'acquérir ce lot No. 22, alors d'autres raisons lui auraient été opposées. La condamnation aux intérêts est légale, vu que les intérêts sont dûs, *ex naturâ rei*, et l'Appelant qui a attendu si longtemps pour demander compensation pour partie de son prix de vente, n'aurait pu le faire sous la loi actuelle française depuis l'acticle 1622 du code civil, cette action étant sujette à la prescription annale.

MEREDITH, Justice: The Respondent, by a notarial deed bearing date the 12th day of July, 1862, sold to Appellant five lots of land in the Township of Litchfield which are described in the said deed of sale as follows: "All and singular "the certain lots being composed of lots No. 12, 27 and 28 in "the first Range, and lot No. 22 in the third Range, and lot "No. 20 in the fourth Range, all these lots situated in the said "Township of Litchfield, in the county of Ottawa, and District of Montreal, containing nine hundred and thirty-four "acres of land, and the usual allowance for highways with "all and every the members and appurtenances thereto belonging." The part of the deed which has reference to the price is in the following words: "The present bargain and sale "is so made, in manner as aforesaid, for and in consideration "of the sum of £140, in deduction and payment whereof, "that is to say £70, were paid at the passing and execution "of these presents, and as to the balance or sum of £70, the "purchaser doth bind and oblige himself, his heirs and assigns, "to well and truly pay or cause to be paid, to the vendor, "his heirs, and assigns in twelve months from this day, without interest." The action in the court below was for the recovery of the sum of £70, balance remaining due upon the price of the five lots of land; Appellant by his plea alleged that Respondent had failed to put him in possession of one of the lots, namely, lot n° 22 in third Range of Litchfield, containing 200 acres: that that lot had been in possession of

certain persons named in Appellant's plea, under title, since the year 1838; that it was impossible for Appellant to obtain possession of it, that it was worth at the time of the sale £120; and that Appellant had a right to have that sum, the value of the said lot, deducted from the *prix de vente*. It is not contended that Appellant has been put in possession of lot n° 22; and the main question submitted for our consideration at the argument was as to the principle to be adopted in determining the deduction from the price to be made in favour of Appellant. The pretension of Respondent is expressed succintly, and, at the same time, clearly, in his factum in the following words: " cinq lots ont été vendus, il en manque un, " le vendeur n'est tenu qu'à la remise du cinquième du prix, de " même qu'il ne serait tenu que de remettre le cinquième du " terrain qui manque, cette proposition est claire et bien défi- " nie en loi." There are doubtless cases in which the rule contended for by Respondent would be applicable. For instance, if a farm containing 500 arpents were sold at sheriff's sale as containing 600 arpents, the *adjudicataire*, under ordinary circumstances, would be entitled to a diminution in the price to the extent of 1/6, and no more; because, in the case supposed, no reason could be assigned for setting a higher price upon the land deficient than upon that forthcoming. But, in the case before us, it is proved there was, at the time of the sale a great difference in the quality of the soil, and, consequently, in the value of the lots sold. According to the evidence of some of the witnesses, the lot not delivered was equal in value to two of the lots delivered, and assuming those delivered to be of equal value, then with reference to the real value of the lands sold Appellant has received but 3/5th of what he purchased, whereas according to the pretensions of the Respondent, and the judgment of the court below, Appellant must pay 4/5th of the whole of the price. To me it appears that, under the particular circumstances of the case before us, in determining the deduction to be allowed to Appellant, we must take into consideration the value of the land delivered, and the *value* of the land not delivered, and not merely the superficial contents of what was delivered, and of what was not delivered; as elucidating my views, I suppose two lots of land of equal size, the one worth £500, and the other £100, to be sold together for £600. If the seller were shown to have had no right to sell the more valuable of the two lots, it would hardly be contended that the purchaser could be compelled to pay £300, for the lot worth £100; and yet, in principle, there is no difference between the case supposed and the case before us. The Respondent, with reference to this view of the case, argues in his factum as follows: " Mais, dit-on, le lot en question vaut à

" lui seul plus que tout le reste, et sans cette circonstance, " l'Appelant n'aurait pas acheté. Cela peut être, mais changeons " la thèse, et supposons que le lot fût inférieur en valeur au " cinquième du prix, est-ce que McVeigh n'aurait pas eu le " droit d'exiger une diminution d'un cinquième de son prix, et " que Lussier n'aurait pu prétendre ne faire déduire que la " stricte valeur du lot ? Supposons qu'au lieu de valoir £28, le " lot n° 22, ne vaudrait que £5, dira-t-on que Lussier ne serait " tenu que de remettre les £5, et non un cinquième du prix, et " qu'il ne pourrait pas opposer cette différence dans la valeur " du lot, et que l'acquéreur ne pourrait pas exiger le rembourse- " ment du cinquième du prix ? Non, telle n'est pas la loi. " The putting of the question in this form does not throw any additional light upon the point under consideration, and, according to my view if the £5 bears the same proportion to £150, that is to say, to the whole of the price, that the value of the land not delivered, bears to the value of the whole of the land sold, then £5 would be the amount of the deduction to which Appellant would be entitled. Turning again to the hypothetical case already mentioned, if the seller had delivered the lot worth £500, and without any bad faith on his part, had failed to deliver the lot worth £100, according to the pretensions of Respondent the purchaser would have a right to keep the lot worth £500, on paying £300, which I hold to be impossible. Pothier, speaking of the case of an *adjudicataire*, says: " Quoique l'adju- " dicataire n'ait pas, en ce cas, une action de garantie, il est " néanmoins équitable qu'il ait au moins une action pour la " répétition du prix qu'il a payé, ou en total, s'il souffre évic- " tion du total, ou à proportion de la perte dont il souffre " l'éviction. " (1) The rule thus laid down appears to me applicable to the present case. The purchaser is entitled to a deduction " à proportion de la perte dont il souffre éviction, " but, as I have already said, the loss sustained by Appellant is not to be measured with reference solely to the superficial contents of the lot not delivered, but by ascertaining the difference between the value of the land that ought to have been delivered Appellant, and the value of the land that has been delivered to him, taking as the value of the whole, the price mentioned in the deed between the parties ; and, for this purpose, it appears to me that an *expertise* should have been ordered. There are cases in which a purchaser evicted is entitled to the actual value of the property taken from him ; but what Appellant contends for, as is expressly stated in his factum, is the value of the lot not delivered " as compared with the value of the lots delivered," and, under the circumstances of

(1) Pothier, Proc. Civ., p. 254.

the present case, I am clearly of opinion that, to that extent the exception of Defendant ought to be maintained. I therefore agree with the other members of this Court in thinking that the judgment of the Court below must be reversed. They however, think that the value of the lot of land of which Appellant has not been put in possession is established to be about £70: and they think it better to award that sum to Appellant than to order an *expertise*. It is obviously of importance that a judgment should be rendered which will put an end to the litigation between the parties, and, as the sum of £70 is about the sum which I think Appellant is entitled to claim for the lot of land not delivered, I do not think I ought to dissent from a judgment awarding him that sum, although, according to my view, a ventilation would be the more regular course.

La Cour d'Appel rendit à l'unanimité le jugement qui suit : " The court, seeing that Respondent, by a notarial deed of sale bearing date the 12th day of July, 1852, sold to Appellant five lots of land in the township of Litchfield, which are described in the deed of sale as follows: " all and singular the certain lots of land being composed of lots n°s 12, 27 and 28 in the 1st range, and lot n° 22 in the 3rd range, and lot n° 20 in the 4th range, all these lots situated in the township of Litchfield, containing 934 acres of land and the usual allowance for highways," the said sale having been so made, as appears by the said deed, for and in consideration of the sum £140, in deduction of part whereof, £70 was paid, at the passing of the deed of sale, the remainder of the price, to wit: £70, being payable under the deed 12 months after the date thereof; seeing also that Respondent, although often requested to put Appellant in possession of one of the lots of land so sold, to wit: of lot n° 22 in the 3rd range of Litchfield, hath wholly failed to do so, and that it hath not been in the power of Appellant to obtain possession of the said last mentioned lot of land; seeing also that, although the sale was a sale of five lots of land, yet that the five lots were not lots of equal value, and, on the contrary, that the lot n° 22 was of much greater value than any of the other lots mentioned in the deed of sale, and worth the sum of £70; considering that Appellant had a right to have the sum of £70 deducted from the price or consideration money mentioned in the deed of sale, and therefore that, in the judgment of the court below which allows Appellant a sum of £28, only, on account of the non-delivery to him of the last mentioned lot of land there is error; doth, in consequence, reverse the judgment rendered by the Superior Court, at Montreal, on the 27th day of March, 1862; and, proceeding to render the judgment which the court below

ought to have rendered in the premises, doth declare that Appellant has a right to have the value of the last mentioned lot of land, to wit: the sum of £70, deducted from the price mentioned in the deed of sale, and, considering that, after deduction being made of the last mentioned sum of money from the price or consideration money mentioned in the deed of sale, there is no balance due by Appellant to Respondent; doth in consequence, dismiss the action of Respondent, and doth condemn Respondent to pay to Appellant his costs as Defendant in the court below including all the costs of his *enquête*. And, as regards the incidental demand in the court below, the same is hereby dismissed with costs in favour of Respondent, and the court doth condemn Respondent to pay Appellant his costs in this court. (13 *D. T. B. C.*, p. 265.)

ROBERTSON, A. and W., pour l'Appellant.

MOREAU, OUIMET and CLAPHAM, pour l'Intimé.

INTERLOCUTOR RESCINDED.—DELAYS.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 4 September, 1863.

Coram Sir L. H. LAFONTAINE, Bart,, Chief Justice, DUVAL, J., MEREDITH, J., MONDELET, A. J.

ABRAHAM HOFFNUNG, (Defendant in the Court below.) Appellant *and* ANDREW PORTER, (Plaintiff in the Court below.) Respondent.

Held: That where an Appellant obtains the leave of the Court to be allowed to appeal from an interlocutory judgment, and since the allowance of the appeal, has not further moved in the cause, and has failed and neglected to sue out a Writ of Appeal as he was bound to do in due course, the Court of Appeals will at its next term rescind and annul its order allowing the appeal. (1)

Defendant, on the 3rd June last, was allowed to appeal from an interlocutory judgment of the Superior Court. The effect of the allowance of the Appeal was to prevent Plaintiff from further moving in the cause in the Court below. Defendant took no further steps on his Appeal, and, in the next term of the Court of Appeals, Plaintiff moved the Court that, in consequence of the Defendant's neglect to sue out a Writ of Appeal, the order allowing the appeal should be rescinded. "The Court, considering that Abraham Hoffnung, on the third day of June last, obtained the leave of this Court to be allowed to appeal from an interlocutory judgment rendered on the thirtieth day of April last by the Superior Court sitting in the

(1) V. art. 1119 C. P. C.

District of Montreal, and that, since the allowance of the said appeal, he has not further moved in the cause, and has failed and neglected to sue out a Writ of Appeal, as he was bound to do in due course, doth grant the motion, rescind and annul the order or judgment rendered by this Court, on the third day of June last, allowing the same Appeal, which order or judgment is hereby set aside with costs, &c." (7 *J.*, p. 301.)

ACTIONS POSSESSOIRES.—PRESCRIPTION DES MEUBLES.

COURT OF QUEEN'S BENCH, Montréal, 7th September, 1863.

Coram DUVAL, J., MEREDITH, J., MONDELET, A. J., MONK J., *ad hoc.*

JOHN W. HERBERT, (Defendant in the Court below.) Appellant, *and* WM FENNELL, (Plaintiff in the Court below.) Respondent.

Held: 1° That in actions respecting moveables, each party has a right to go into the question of property.

2° That the prescription of 3 years, in cases of moveables, cannot be maintained without proof of good faith. (1)

3° That the knowledge of a party invoking such prescription that the person from whom he claims to have acquired a moveable was not the owner thereof is evidence of bad faith.

This was an Appeal from a judgment rendered by the Circuit Court, at Montreal, on the 30th December, 1861, maintaining a *saisie revendication*, at the instance of Respondent, of a violin which Appellant had borrowed from Respondent, but which the former refused to return, on the ground that it was his property. The Judgment appealed from was: "La Cour, considérant que le Défendeur ne détient le violon mentionné en la déclaration et revendiqué sur lui qu'à titre de précaire et du Demandeur, pour l'avoir eu à titre de prêt ou à l'essai, vu que le Défendeur en avait perdu toute possession à titre de propriétaire depuis plus de trois ans, avant qu'il soit devenu de nouveau en ses mains à titre précaire, comme susdit: Considérant enfin qu'au jour de l'institution de cette action et avant qu'il fût venu aux mains du Défendeur au titre susdit, le Demandeur était alors propriétaire en possession pour l'avoir acheté de William Léonard qui en était alors en possession; déclare la Saisie Revendication bonne et valable, et condamne le Défendeur à remettre le violon saisi, sous quinze jours, à compter de la signification de ce Jugement, sinon à payer la somme de cinq livres courant, pour la valeur d'icelui."

(1) V. art. 2268 C. C.

DEVLIN, for Appellant: In the month of July, 1861, Respondent instituted the action in which the Judgment appealed from was rendered. The object of the action was to obtain from Appelant the possession of a violin which Respondent alleged was his property, and which he further stated was illegally detained by Appellant, he also set forth that this violin was of the value of £25, and concluded by asking for a writ of *Saisie Revendication*, under and by virtue of which the violin was seized in the hands of Appellant. To this action Appellant pleaded that Respondent was not the proprietor of the violin so seized; that, on the contrary, it was Appellants' property, and was subreptitiously taken from his son, to whose care and custody it had been temporarily entrusted, whilst on his way from Quebec to Montreal, by Railroad. Respondent, by his answer to Appellant's plea, alleged that he became the proprietor of the violin by purchase from one William Leonard, and that, before the institution of his action, Appellant's son borrowed it, and afterwards refused to give it up. The evidence adduced establishes these facts: Firstly, that George Herbert, a minor son of Appellant had, in the year 1856, a musical engagement in Quebec: that he, accordingly, went there from Montreal, taking with him his favorite violin, the one in question, to which he attached great value; that, upon his return home, he travelled by the Grand Trunk Railway, and, upon his arrival at Longueuil, opposite Montreal, occupied himself in seeing his baggage transferred from the cars to the Ferry Boat, which was then in 1856, used and employed by the Grand Trunk Co., to take their passengers arriving by the cars to Montreal; that, immediately after seeing his baggage deposited on this Ferry Boat, he returned to the car for his violin which was carefully locked up in a case, but found that it had been taken away from the place in which he had left it. Thereupon, he searched for it diligently, but to no purpose. Upon his arrival home, he informed Appellant of the fact, that his violin was stolen, and he immediately communicated the circumstance to the Agents of the Company, who, upon their parts, promised to use every effort for its recovery. But, notwithstanding that careful enquiries were made for this purpose, no trace of the violin could be found, and so it remained, until, a short time before its seizure by Respondent, it was brought to Appellant's shop for the purpose of ascertaining its value, where it was at once recognized by Appellant's son as the same violin which had been stolen from him on his way from Quebec to Montreal. Appellant not knowing what his rights were, under the circumstances, allowed it to be taken away. But, being, in a short time afterwards, given to Appellant's son by Respondent's brother, it

was retained by Appellant. It is also incontestably proved that this violin was taken, or, in other words stolen by William Leonard, who subsequently sold it to Respondent, the latter well knowing at the time he so purchased it, in what way Leonard became possessed of it. This man Leonard was, at the time of the theft, an engineer on board the Grand Trunk Ferry Boat, plying between Longueuil and Montreal. And it is worthy of remark that, according to his own admissions, sworn to by himself, it was on board this same boat and whilst he was so employed as engineer, that he fraudulently carried off the violin, secreted it and appropriated it to his own use. Appellant submits, that, with a correct application of the Law to the facts proved, the Judgment is not sustainable. Because the prescription of three years, upon which the Judgment was evidently predicated, could not, under the circumstances detailed in evidence, be invoked to favor the possession set up by Respondent. For it must be borne in mind, that Leonard's possession of the violin can only be regarded as the possession of a thief, a fact too well known to Respondent, before and at the time he purchased this instrument through the agency of his friend Gethings, who was also examined as his witness. Can it therefore be said that Leonard possessed the violin in good faith for three years? True it is, that he had it in his possession for a much longer period of time; but, he so had it, by a felonious taking in the first instance, and, surely, his subsequent retention of it unknown to Appellant, ought not to operate in his favor, a title founded upon a prescription which requires a possession of three years in good faith and one untainted by theft. If, therefore, Leonard's possession of the violin did not constitute him the proprietor of it, it follows as a matter of course, that this sale of it to the Respondent gave him no title whatever, to or over it. For Leonard having no right in the violin, could transfer none. *Nemo plus Juris in alium transferre potest quam ipse habet.* Respondent had possession of it about six months before the institution of his action, having acquired the violin in the way already mentioned, and he of course cannot invoke three years prescription.

LORANGER, for Respondent: Le Jugement dont est appel fut rendu par la Cour de Circuit, à Montréal, maintenant la saisie revendication d'un Violon, la propriété de l'Intimé revendiqué entre les mains de l'Appelant. L'Appelant avait plaidé que ce Violon était sa propriété, et qu'il avait été perdu en 1856, par son fils mineur dans un voyage entre Québec et Montréal, dans les waggons de chemin de fer. Quatre témoins ont prouvé la propriété de l'Intimé qui avait acheté ce Violon d'un nommé Léonard, employé de la Compagnie du Grand

Tronc, il y a à-peu-près un an, et pour trois dollars; que l'Intimé l'avait porté chez l'Appellant et l'avait présenté au fils du Défendeur pour l'examiner ou l'évaluer, il y a quelques mois, et que Herbert fils, ne l'avait pas alors réclamé. Depuis, Herbert fils, en compagnie du nommé Prince, musicien, est allé emprunter le violon, en s'adressant au frère de l'Intimé, qui le lui a laissé emporter à l'essai et pour l'examiner, jusqu'au lendemain. Le lendemain, le frère de l'Intimé s'étant présenté chez Herbert, fut remis au surlendemain, et, enfin, Herbert lui a écrit que le violon était celui qu'il avait perdu en 1856, et que l'ayant retrouvé, il le gardait comme sa propriété. Une chose est constante : En 1861, il était la propriété et en la possession de l'Intimé, pour l'avoir acheté d'un tiers, et il ne s'en est dessaisi ou en a perdu la possession qu'en le remettant à l'ancien propriétaire qu'à titre de prêt ou à l'essai, enfin, à *titre de précaire*. Sur la prescription en fait de meubles, l'on peut citer Pothier, vol. 4, *Prescription* No. 204, 205: "La disposition du droit romain qui ne permet pas qu'un possesseur de bonne foi puisse acquérir par la prescription, les *choses furtives*, me paraît être *un droit purement arbitaire*, et je ne vois rien dans ces principes du droit naturel qui doive empêcher le possesseur de bonne foi *d'une chose furtive*, de l'acquérir par la prescription. C'est pourquoi, dans le *Pays Coutumier* où le *Droit Romain* n'a pas par lui-même force de loi, mais seulement en tant qu'il paraît pris dans le droit naturel, je doute très fort que cette disposition du droit pour les *choses furtives* y doive être observée." Nonobstant cette opinion de Pothier, on trouve dans Denisart, 3 vol., verbo *Prescription* p. 730 ce qui suit: "La *Coutume de Paris* n'a point de règle, et je n'en connais point qui fixe le temps pendant lequel il faut posséder des meubles pour acquérir la propriété. Nous tenons au Châtelet pour maxime certaine : Que celui qui est en possession de meubles, bijoux, et argent comptant, en est réputé propriétaire *s'il n'y a titre au contraire*. Ferron, sur Bordeaux, agite cette question de la prescription des meubles," et rapporte différentes opinions sur la prescription des meubles. La Peyrère: Lettre P, No. 98, n'est point d'avis que la prescription des meubles ait lieu par trois ans, et son apostilleur dit qu'il faut trente ans pour prescrire les meubles et les immeubles. Ce que dit Denisart, qu'en fait de meubles, la possession vaut titre, au titre de la prescription relativement aux meubles, est aussi adopté par Bourjon, Tome 1, Tit. 22, p. 1094. Bourjon No. 1, "La prescription n'est d'aucune considération quant aux meubles, puisque la simple possession d'iceux produit tout l'effet d'un titre parfait; principe qui applanit les difficultés, que le silence que la coutume de Paris a gardé sur cette prescription, faisait naître. Quelques-uns ont

prétendu qu'il fallait une prescription de 30 ans ; mais cela n'était pas raisonnable, puisque pour les immeubles, avec titre et bonne foi, elle ne requiert que 10 ans ; inconvénient qui avait conduit d'autres à dire que conformément aux Institutes L 2, Tit. 6, il fallait une possession de 3 ans. Les contradictions cessant par le principe qu'on vient de poser, il est étrange qu'on ait tenté de s'en écarter. Suivant la Jurisprudence du Châtelet, la possession d'un meuble ne fut-ce *qu'un seul jour* vaut titre de propriété, sauf le cas de vol." No. 2 : " La *chose furtive* peut être revendiquée partout où on la trouve, c'est la seule exception qu'on puisse apporter à la règle ci-dessus posée, *qu'en matière de meubles la prescription vaut titre.*" No. 3 : " Pour donner ouverture à ce droit de suite et revendication, il faut que le vol soit *juridiquement* constaté par une plainte d'information, ou autrement il y aurait fin de non-recevoir dans la demande ou revendication et, dans ce même cas, la possession déciderait toujours, ce qui confirme ce que dessus." L'on voit par ce que dessus en quels cas la maxime que "*la possession vaut titre,*" invoquée par l'Appelant, lors de l'argument, peut et doit être admise, ce n'est certainement pas dans le cas présent. L'Intimé ayant acheté de bonne foi le violon en question, et l'Appelant n'en étant devenu en dernier lieu en possession, non pas *animo Domini,* comme maître ou propriétaire, mais seulement comme emprunteur ou pour l'essayer. Mais voyons ce que rapporte maintenant Troplong, V. 2, *Prescription,* sur les deux articles du Code Napoléon sur cette matière : 1° Art. 2279 : " En fait de meubles la possession vaut titre. Néanmoins celui qui a perdu ou auquel il a été volé une chose peut la revendiquer *pendant trois ans,* à compter du jour de la perte ou du vol contre celui dans les mains duquel il l'a trouvée, sauf à celui-ci son recours contre celui duquel il la tient." Le Code a innové à l'ancien droit, en introduisant la prescription de 3 ans, hors le cas de *perte* et de *vol ;* art. 2280 : " Si le possesseur actuel de la chose volée ou perdue l'a achetée dans une foire ou marché, ou dans une vente publique, ou d'un marchand vendant de pareilles choses, le propriétaire originaire ne peut se la faire rendre qu'en remboursant au possesseur le prix qu'elle lui a coûté." Après avoir commenté au long sur ces deux articles, il se résume ainsi au No. 1041 : "Sous l'ancien droit il y avait trois systèmes : 1° Le premier, qu'on devait appliquer aux meubles les mêmes principes et les mêmes délais de prescription qu'aux immeubles ; 2° le second, qui, suivant le droit romain, finirait à trois ans, le temps de la prescription des meubles ; 3° le troisième, enfin, qui, pour mettre tout le monde d'accord, n'exigeait aucune prescription, et donnait à l'occupation tout l'effet de la propriété, à moins que la chose n'eût été volée. Le dernier était

adopté par Bourjon et autres au Châtelet." No. 1044: "Lorsque l'Intimé agit en vertu d'un titre ou d'une convention avec celui qui possède, son droit pour réclamer le meuble ne se prescrit que par le délai ordinaire voulu pour prescrire l'action résultant de la convention. V. G. Je vous donne un meuble à titre *de dépôt ou de prêt*. Votre possession qui n'est qu'une possession provisoire, n'a aucune vertu en présence du titre que je lui oppose. Je la réduis à sa juste valeur en faisant paraître votre obligation, et ce n'est pas ici qu'est appliquée la maxime: *En fait de meubles la possession vaut titre.*" Ou, du moins, la possession est indice de la propriété d'un meuble ou d'un immeuble, ce n'est qu'en autant qu'on ne montre pas un *titre contraire* qui prouve que vous, possesseur, vous ne tenez que de moi votre détention. En appliquant ces principes à la cause actuelle, il faut dire: 1° Que l'Appelant ne détenant le violon en question qu'à titre de précaire de l'Intimé, en vertu d'un contrat ou prêt, ne peut lui opposer que "*la possesion vaut titre.*" 2° Qu'au jour de l'institution de l'action, l'Intimé en était propriétaire en possession, *animo domini*, pour l'avoir acheté de Léonard.

MEREDITH, J.: The controversy between the parties is as to the ownership of a violin, of no great pecuniary value; but, notwithstanding this, the question of law which the case presents, is of importance. It appears that, about five years before the institution of the action in the court below, Appellant's son, George W. Herbert, then a minor, being a passenger from Quebec to Montreal, by the Grand Trunk Railway, lost the violin in question. It was found on the deck of the Grand Trunk Ferry Boat, by the second engineer, Leonard. This person ought, of course, to have handed the violin to the proper officer of the Grand Trunk company; but he did not do so. On the contrary, after, as he says, telling the engineer of the boat, and the working men that he had found the violin, he kept it for some time in his berth, on board the boat, then took it to his lodging house on shore, broke open the case, took the violin, and used it as his own; and afterwards sold it to Respondent who, at the time, was perfectly aware of the manner in which his vendor had obtained possession of it. In order to prevent any doubt as to this important point, I may observe that Leonard, being examined for Respondent, in his cross examination, says: "Plaintiff and Gettings (who pur-"chased the violin for him) were both aware of the fact that "I found the fiddle as I have mentioned," and James Fennell, the brother of Plaintiff, says; "my brother Plaintiff, and Gettings, knew that this violin had been found on the Grand Trunk Ferry boat," and Gettings, who purchased the violin for Plaintiff, says also that Leonard told him "he had found the

violin on board the boat." It seems to be thought by Respondent that, under the circumstances just mentioned, some description of prescription can be urged against Appellant, but such is not the case. Assuming, for the purpose of the present discussion, that, under our law, there is a prescription of three years as to moveables, Respondent cannot derive any advantage from that prescription, as it certainly requires good faith. Dunod, page 150, says " Les meubles se prescrivent par trois " ans avec titre et bonne foi;" and, Pothier, prescription, No. 205, says: " il faut pour cette prescription que le possesseur " justifie d'un juste titre d'où sa possession procède, et qu'elle soit " de bonne foi." Under the modern law of France, also, (1) it is quite certain that for the prescription of moveables, by any period less than three years, *good faith is required.* As to the question of good faith, with reference to the case before us, it is plain there was nothing of the kind on the part of the finder Leonard; indeed, his conduct was not consistent with common honesty. His duty was to take the violin to the officer of the Grand Trunk Company, empowered to take charge of such things; and, he admits, that, about a week after he found the instrument, that being about three weeks before he broke open the case, he knew that such was his duty. And there can be but little doubt that had he done what he knew he ought to have done, Appellant would have found his property. As to the possession of Respondent, who bought the violin from Leonard, knowing that he was not the owner of it, it is sufficient to observe that his possession lasted but a few months; and, therefore, cannot by itself be of any advantage to him as supporting a plea of prescription. I hold it, therefore, to be certain that Respondent, at the time of the institution of the proceedings in the court below, had not acquired a right of property in the violin in question; and, on the contrary, that Appellant then remained as perfectly owner of it, as he was the day his son lost it. Up to this point, I believe there cannot be any difficulty, but a question has been raised as to whether, considering the mode by which Appellant obtained possession of the violin, we ought, by our judgment, to allow him to retain that possession. The facts as to this part of the case are to be found in the evidence of George W. Herbert, the son of Appellant. This witness says: " McCulloch brought this violin to me, to ask me my opinion about it. I looked at the violin, and recognized it as being my property, and I returned it to McCulloch. Some weeks after, I saw the same violin in the possession of Plaintiff's brother, James Fennell. I went to see

(1) Troplong, *Prescription*, No. 1043, Vol. 8, page 656; Marcadé, *Prescription*, p. 247.

James Fennell with Maffre, at the request of the latter. I saw the violin there in the possession of James Fennell. James Fennell offered me the violin to take to my house to try. I brought the violin with me at my place. James Fennell told me that this violin was his brother's property. Fennell called for the violin. I told him I had not examined the violin yet, that I would see to it next day. Question: "On that occasion did you not say to James Fennell that you would send him down the violin the next day?" Answer: "I don't remember saying that at all. I don't know if Fennell came for the violin twice, I wrote to James Fennell the very next day after, as I think Fennell called for the violin informing him that I had taken a legal advice that the violin was mine, and I would retain it, I said that the violin was mine and I had lost it some years previous." It is said that the evidence of the witness shows that Appellant obtained possession of the violin by a trick; and, therefore, that he ought to be compelled to reinstate Respondent in possession, irrespective of any question as to who is the owner. In order to maintain this pretension, even if it were founded in fact, it seems to me we would have to treat this action as if it were an action *en réintégrande* for the recovery of the possession of real estate; whereas we know that there cannot be an action in complaint or *en réintégrande* as regards a chattel (1) It is not necessary, as regards the present controversy, to express an opinion as to whether there may not be cases in which the possession of moveables might be recovered irrespective of the question of property. For the decision of the present case, it is sufficient to observe that the general rule is that. in action respecting moveables, each party has a right to go into the question of property. From that rule, in the present case, Pothier says: "Notre droit français est, en "cela, différent du droit romain qui accordait une action pos-"sessoire appelée *Interdictum utrubi* à ceux qui sont troublés "dans la possession d'une chose mobilaire. *Mais, dans notre "droit françois, lorsque deux parties se disputent une chose "mobilaire, on entre d'abord dans la question de propriété*"; (2) and, Rodier, in his commentary on the ordonnance of 1667, after saying that an action *en complainte et en réintégrande* may be maintained as to an *universalité de meubles*, says: *mais, pour un meuble en particulier, on doit procéder*

(1) *Custom of Paris*, art. nº 79; Serpillon, p. 274; Guyot's *Répertoire*, vol. 4, p. 292, vbo *Complainte;* Pigeau, vol. 2, p. 131; Nouveau Dénisart, vol. 5, p. 21, vbo *Complainte;* Curasson, *Des actions possessoires*, p. 142; Garnier, *action possessoire*, p. 192-94.

(2) Pothier, *Traité de la possession*, nº 93. See exception to the general rule, Pothier's *Possession*, 108.

par autre action, comme maître et propriétaire d'icelui, savoir par action criminelle pour fait de vol. (1) Such, I repeat, is the general rule; and in the present case, in which Plaintiff purchased from a person whom *he knew* was *not the owner of the thing sold*, and in which there has been *no violence* on the part of Defendant, I see no reason for a departure from the general rule as laid down by Pothier. There is, however one consideration which appears to me very important, if not conclusive as to this part of the case. It is that the parties by their pleadings have directly raised the question as to the ownership of the violin. And, as that question has been so raised; and, as according to my view, the right of ownership is, beyond doubt, in Appellant, it seems to me impossible for us, without changing, as it were, the nature of the demand, to award the violin to the party whom, we say, is *not* the owner of it. There remains one other point which I desire to notice, it is the pretension that the violin, if it belong to either of the Herberts, belongs to George Herbert and not to his father Appellant. George Herbert, in his examination in chief, speaks of the violin as being his, but, in his cross examination, be explains his meaning, and says; " I was a minor at the time I lost the violin, and under the care of my father. When I say the violin was my property at the time, I mean of course that I had the charge and keeping of it, but the property was in my father. I now look upon it as mine since I have attained the age of twenty-one years for the reason that it was originally bought for me." And, towards the close of his evidence, he says: " the price paid is marked upon it, although almost " invisible, being the very same mark upon it when I lost it. " The price marked upon the violin is $20, *which was the amount paid for it by my father.*" We are to judge of the case by the facts proved, and not by the impression of the witness. As to a matter of law, and according to the facts proved Appellant, and not the witness, his son, is the owner of the violin in question. For these reasons it seems to me that the judgment of the Superior Court, awarding the violin to Respondent, who, according to the views of the majority of the court has no right to it cannot be maintained.

DUVAL, Justice, *dissenting*: Said that, although the case in itself was of no importance, yet, he considered that the judgment which was about to be pronounced would establish a principle which he had always considered as dangerous, namely, that a man might be a witness in his own cause, and by his own testimony prove his case. It might be said that it was the son who was giving evidence for his father, but he

(1) Rodier, *Com. on ord. 1667*, p. 315.

was of opinion that the son was the party principally interested, and he was getting *gain de cause* by his own oath. It was true that the legislature permitted the son to be examined as a witness, but the legislature never intended that the court should pay so much attention to the testimony of such an interested witness, as to let him gain the case by his own oath. (1)

MONDELET, Justice; Was nct apprehensive that the judgment would ever be referred to in this way. The remarks of his learned brother would leave the impression that the son was the Plaintiff, which was not the case. The son was not a party to the case, and, therefore, he was a competent witness. As to his credibility, it was in the discretion of the court to determine what reliance it would place on his testimony. The son, then, being a competent witness, was able to prove that the violin belonged to his father. From a review of the circumstances, his honor was of opinion that he was not only a competent witness, but also credible, and that the fact of his having recovered possession of his father's violin by a *ruse de guerre*, did not at all affect the legal ownership vesting in the father.

" The Court, Seeing that the violin mentioned in the pleadings, being the property of Appellant, was, about five years before the institution of the action in the Court below, lost by George W. Herbert, Appellant's son, then a minor, on board a certain steamboat, belonging to the Grand Trunk Railway Company, George W. Herbert being, at the time he so lost the violin, a passenger on board the said steamboat. Seeing that the violin, immediately after it was so lost by George W. Herbert, was found by William Leonard, the second engineer of the steamboat. Seeing that Leonard, instead of taking the violin to the proper officer of the Grand Trunk Railway Company, as he was bound to do, kept it for some time in his berth, on board the steamboat, then took it to his lodging house, on shore, where he broke open the case containing the violin, took out the violin, and used it as his own. Seeing that it is indisputably established, by the evidence adduced, that when Respondent purchased the violin from Leonard, about six months before the institution of the action of Respondent in the Court below, Respondent had full knowledge of the manner in which Leonard had become possessed of the violin: Considering, therefore, that the sale of the violin could not give a right of ownership in it to Respondent, who knew, at the time of the sale, that the person selling the violin, not only was not the owner of it, but, on the contrary, had

(1) V. art. 251 et 252 C. P. C.

obtained possession of it wrongfully and retained possession of it dishonestly: Considering also that, at the time of the institution of the action in the Court below, Respondent had not acquired any right to the violin by prescription; the possession by Leonard of the violin having been in bad faith; and the possession of Respondent, (irrespective of any question as to bad faith on his part) having existed for too short a time to serve as a basis for a plea of prescription; and, therefore, that the right of property of Appellant, in the violin, was as perfect at the time of the institution of the action in the Court below, as it was at the time the violin was so lost by the minor son of Appellant. And, considering that the fact of the violin having been borrowed by the son of Appellant from the Respondent, a short time before the institution of the action in the Court below, cannot give Respondent a right to claim, as belonging to him, as he does by his declaration the violin, which does not belong to him, as he must be aware, he having purchased it from Leonard, under the circumstances aforesaid; and, considering, therefore, that, in the judgment of the Court below, which condemns Appellant to deliver up the violin to Respondent there is error, this Court does, in consequence, reverse the judgment rendered by the Circuit Court, at Montreal, on the thirtieth day of December, 1861, and, proceeding to render the judgment which the Court below ought to have rendered in the premises, doth dismiss the action of Respondent against Appellant. The honorable Mr. Justice DUVAL dissenting. (13 *D.T.B C.*, p. 385 et 7 J., p. 302.)

DEVLIN, for Appellant.

LORANGER ET FRÈRES, for Respondent.

AFFRETEMENT

SUPERIOR COURT, Québec, 5 février, 1863.

Before: TASCHEREAU, Justice.

TARR, et al., *vs.* DESJARDINS.

1° La loi impose comme devoir au propriétaire d'un vais eau, qui a une charge, de procéder sur son voyage de la manière ordinaire, sans déviation inutile.

2° Il est du devoir des capitaines de vaisseaux d'aider et d'assister les vaisseaux en détresse en mer, et, pour cet objet, un vaisseau peut sortir de sa route régulière, et ceci ne sera pas considéré comme déviation; mais ayant rendu secours à ceux à bord, le capitaine n'a pas le droit de risquer sa propre charge pour rendre des services de sauvetage.

3° Nulle personne en faute n'a le droit de qualifier son tort, et quand

il en est résulté une perte, qui est attribuable à sa déviation coupable, le capitaine de vaisseau ne peut en réponse à l'action alléguer une perte possible, s'il n'avait pas commis le tort qui lui est imputé. (1)

This was an action of damages instituted by Plaintiffs against Defendant for deviating from his voyage. The Defendant was the master and owner of a schooner called the *Emédine*, and, in November, 1861, he undertook to carry and convey, in his schooner, a quantity of fish valued at the sum of $1761.15, belonging to Plaintiffs, from the port of Halifax to Quebec or Montreal, for hire. Having set sail from Halifax, the *Emédine* made her way up on her voyage as far as Fox River, a little above cape Gaspé, when, on the 9th of November, whilst tacking up against an adverse wind, Defendant perceived a vessel to windward of him with a flag of distress flying. After several tacks, he came alongside the vessel, a three masted schooner of about 400 tons burden, called the *Royal Middy*, which was water logged. The *Emédine* took this vessel in tow and made for Gaspé Basin, a port some forty five miles to leeward of where the vessels met, and further from her port of destination. On the evening of the 15th the *Emédine* succeeded in safely bringing her tow to anchor in the basin. The Defendant finding the steamer *Lady Head* there, on her way up from the lower ports, immediately discharged his crew and paid their passage to Quebec, for which place the *Lady Head* left a few hours afterwards. The Defendant remained behind to look after his vessel, but made no attempt whatever to take her out of the basin or to proceed on his voyage, and the *Emédine*, with her cargo on board, wintered there. The Plaintiffs being, in consequence of the non-arrival of the schooner, deprived of the opportunity of selling their fish in Quebec or Montreal, before the close of the navigation, instituted their action. The Defendant pleaded that he was driven back by stress of weather, and that, while returning, he saw the *Royal Middy* with a flag of distress up, and, in order to save life, he made for her and took her in tow, that the weather was such, that the time taken up in putting her into a port of safety did not delay him on his voyage which he could not continue, the wind being continually contrary and accompanied with snow, and that many other schooners, some of which were to windward of him, were obliged to put back and winter in the same port as the *Emédine* did. Issue being joined, the parties went to evidence, when the facts alleged by the Plaintiffs were proved, as also that Defendant had been allowed, by the Court of Vice Admiralty for Lower Canada the sum of £400 for his salvage services rendered to

(1) V. art. 2426 C. C.

the *Royal Middy*. (1) Witnesses were examined who proved the perishable nature of makerel and fish generally, and proof was given that Defendant might have brought his schooner and cargo to Quebec, if he had accepted the offer of a tow from a steamer to a position in which he would have found a favorable wind. The Defendant's witnesses proved that the autumn in question was stormy, and that winds contrary to vessels endeavouring to make the port of Quebec from below almost constantly prevailed.

CAMPBELL, for the Plaintiffs, urged that contracts of this nature, by which masters of ships undertook to carry goods to a particular place and deliver them in good order and condition, unavoidable accident only excepted, should be construed strictly in favor of Plaintiffs; that Defendant's liability was that of a common carrier, and, as he undertook to carry the goods for hire, he was bound to deliver them at all events; that he was liable for inevitable accident happening though the intervention of any human means, and that he was bound to guard against future as well as to rescue from present danger, and that the law implied a duty on the owner of a vessel whether a general ship or hired for the special purpose of the voyage, to proceed, without unnecessary deviation, in the usual course; that there was no necessity whatever to make for Gaspé basin; though the feelings of humanity would dictate the necessity of one vessel making towards another that had the flag of distress flying, and for which, though a deviation, the laws would protect the master of a vessel so deviating; still, having reached the vessel in distress and taken off the crew and passengers, his duty was done and he had no right to imperil the cargo intrusted to him, to benefit himself by salvage services; that it was not inevitable accident or stress of weather that caused the deviation was established by the fact that it took two days to put the *Royal Middy* into a port of safety; thus evidencing that the state of the weather could not have been very stormy or the *Emédine* would have been obliged to slip her tow. That the fact, that other vessels could not tack up from below, had nothing to do with this case; none were in such a position upon the day in question; that there was no evidence to prove that Defendant had attempted to leave Gaspé and had failed; and that, even if there had been such proof, it could not have availed him as he had no right to be there; and a wrongdoer should not be allowed to apportion or qualify his own wrong. (2)

(1) 12 L. C. Rep., page 309.

(2) Pothier, *Charte partie*, n°s 31, 38; Emerigon, vol. 2, p. 62, and following.

CARON, for Defendant. The Defendant is a master mariner having his full sympathies for those of his class who are in distress, and, when he perceived the flag of distress, he had no other course to adopt than that of bearing towards the *Royal Middy*, in so doing there was no deviation, and, in taking her in tow, he was justified; Plaintiffs have no right to call in question his power of doing so; for had he not even taken the distressed vessel in tow, he had intended, as established by the evidence of the crew, to put back and make for Gaspé Bay, there to wait for a favorable wind, and the time taken in saving the *Royal Middy* did not prejudice Plaintiffs. as during that time he could not have advanced on his voyage in consequence of the adverse winds and currents.

JUDGMENT: "La cour considérant que, le 1er novembre, 1861, en la cité de Halifax, le Défendeur, comme propriétaire d'une certaine goëlette dont le Défendeur était aussi le maître, a reçu en chargement de la part des Demandeurs, et a mis à bord de goëlette les quantités suivantes de poisson, savoir: etc., pour les transporter du port d'Halifax à l'un ou l'autre port de Québec ou Montréal, moyennant un fret ou une remunération; considérant que le Défendeur a subséquemment fait voile d'Halifax pour les ports ci-dessus de Québec ou de Montréal, mais qu'il n'a pas poursuivi sa course ni continué son voyage avec la goëlette vers sa destination, et qu'il a dévié de sa course pendant plus de quarante huit heures; considérant que la cause pour laquelle le Défendeur a dévié de sa course et interrompu son voyage, ne le justifie pas en loi, et le rend responsable des dommages que les Demandeurs ont pu éprouver par suite de la perte de la cargaison, ou de retard dans sa livraison; considérant que, quoique le Défendeur fût justifiable de dévier de sa route pour répondre au signal de détresse qui lui parvint de la part du *Royal Middy*, au secours duquel il s'est porté, sous l'impression que l'équipage était en danger de perdre la vie, néanmoins, le Défendeur, après avoir constaté que l'équipage n'était pas en danger imminent, ou après avoir insisté à transférer à son bord cet équipage pour le sauver s'il y avait danger, devait de suite reprendre sa route sans prendre le trouble de touer ce vaisseau dans une direction tout opposée à celle de sa destination; considérant que, pour le sauvetage de ce vaisseau, le Défendeur a reçu £400 0 0 pour son indemnité; considérant que le Défendeur a lui-même juré, devant la Cour d'Amirauté, qu'avant le moment où il avait aperçu le *Royal Middy* en détresse, il n'avait eu aucune idée d'arrêter ou de dévier en aucune manière de sa route, et que c'est dans le but unique de sauver le *Royal Middy* qu'il a dévié; considérant que le Défendeur, en arrivant au port de Sandy Bay avec le *Royal Middy*, s'est mis dans l'impossibilité de reprendre son

voyage en déchargeant son équipage ; considérant que le maître du vapeur *Lady Head*, a offert de touer la goëlette du Défendeur hors du bassin de Gaspé, de manière à lui permettre de prendre le large, et ce gratuitement, et que le Défendeur a refusé ; considérant que le Défendeur a négligé les chances de la navigation ; considérant qu'en loi la simple déviation de la route sans cause légitime et nécessaire, expose le maître du vaisseau à toutes les conséquences les plus sérieuses, quoique cette déviation puisse n'avoir eu aucun rapport avec la cause de la perte ou des dommages ; considérant que le fait assez problématique qu'un certain nombre de goëlettes se soient trouvées obligées de mettre en hivernement au même temps et place que le Défendeur, ne peut changer la position du Défendeur, qui, du moment qu'il a dévié de sa route, a perdu tout droit à la protection de la loi, ou qui du moins à raison de sa conduite devait tout faire pour essayer de réparer son tort, mais qui loin de cela se met dans l'impossibllité de continuer sa route, en déchargeant son équipage ; la cour, adjugeant que le Défendeur est passible des dommages que les Demandeurs ont éprouvés, par suite du retard apporté à la livraison de leur poisson, condamne le Défendeur à payer la somme de $750.00, etc. (13 *D. T. B. C.*, p. 394.)

CAMPBELL, for Plaintiffs.

CARON, for Defendant.

OPPOSITION A SAISIE MOBILIAIRE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 12 décembre 1862.

Before : AYLWIN, DUVAL, MEREDITH, MONDELET, and BERTHELOT, Justices.

MCBLAIN, Appellant, and OLIVER, Respondent.

Jugé : Que dans les cas d'oppositions afin de distraire, etc., si aucunes des parties à la cause ont déclaré qu'elles entendaient contester aucune telle opposition, et néanmoins font défaut de contester après avoir été régulièrement mises en demeure de ce faire, les parties opposantes ne seront pas, néanmoins, en droit d'obtenir jugement sur leurs oppositions, *de plano*, mais devront procéder comme dans les causes *exparte* faute de plaidoyer, et donner avis d'inscription à la partie qui a déclaré son intention de contester, de manière à ce que telle partie puisse transquestionner aucuns témoins produit par tel opposant ; et que, en pareils cas, un opposant ne tombe pas sous l'opération de la 84ème règle de pratique. (1)

The facts of the case will appear from the arguments of counsel, and from the remarks made upon the rendering of the judgment.

(1) V. art. 586 et 587 C. P. C.

HOLT, FOR APPELLANT: The present appeal raises an important question of practice. The Respondent, by an opposition *afin de distraire*, claimed various goods and chattels seized at the instance of Appellant, upon Defendant in the Court below, Thomas Hamilton Oliver. The Opposant called upon Plaintiff to declare whether he intended to contest or admit the opposition. No rule was served upon Defendant. The Plaintiff declared that he intended to contest the opposition. The Opposant having demanded a plea, and no plea having been filed, Plaintiff was foreclosed in due course. The Opposant, then, instead of proceeding to *enquête, ex parte* moved the Court, without notice to Plaintiff, that, inasmuch as neither Plaintiff nor Defendant had contested the opposition, the conclusions of the same should be granted; and, on the 5th November, 1860, judgment was rendered, by which the Court declared that: "Considering the opposition hath "not been contested, and that the delay so to do hath expired, "doth maintain the opposition, and, in consequence, doth order "that, from the seizure of moveables effected, distraction be "made in favor of Opposant of the goods, chattels, etc., claim-"ed in the opposition, etc., and doth grant *main levée* of the "seizure thereof to Opposant, with cost of the opposition in "favor of Opposant, and against Plaintiff." This judgment, Appellant submits, is erroneous, and unwarranted by any law or by any rule of practice. The opposition *afin de distraire* contains a *demande* which the law requires to be proved, in like manner as other claims set up before the Court. An exception is made by the 84th rule of practice of the Superior Court. Under this rule, it is submitted, Opposant was not entitled to judgment without proof; Plaintiff had declared that he intended to contest, and there had been no rule served upon Defendant. There was no admission whatever, on the part of Plaintiff, of the claim set up by the opposition, and, although foreclosed from the right of filing a plea, Plaintiff had still the right of appearing at the *enquête*, and of cross-examining Opposant's witnesses. The claim of Opposant not being admitted, he was bound to establish it by evidence before he could legally obtain judgment of *main-levée*.

STUART, for Respondent: The Appellant does not appear to have had any intention of contesting Respondent's opposition, notwithstanding his declaration to that effect. After the expiration of about four weeks, without any contestation being filed, Respondent was obliged to take steps to force Appellant to file one, if such were his intention, and, accordingly, on the 27 of the same month of June, he demanded a plea or pleas to his opposition, and the demand was made on Holt and Irvine by a personal service on them. Notwithstand-

ing this demand, Appellant persisted in his refusal to contest, and, on the 2d of November, 1860, Respondent foreclosed them, and, immediately afterwards, moved for judgment on his opposition. On the 5th of November, 1860, the court pronounced a judgment declaring that the delay for contesting the opposition had expired, and maintained the opposition, with costs against Plaintiff. By this judgment, the court has given effect to the rule of practice relied on by Respondent. The Appellant had made a false declaration, in order to prevent Respondent from having his property restored to him. The court below treated this declaration as no declaration, and pronounced its judgment according to the conclusions of the opposition. The law and practice in the court of original jurisdiction in Lower Canada, has, invariably, been to consider the facts set forth in an opposition, regularly filed, to be true, unless there be a contestation of such opposition, so much so that monies have always been awarded by judgment of distribution upon the mere allegations of the parties, without proof, except so far as the swearing to the truth of the opposition may be considered proof, as was done in this case. As neither Plaintiff or Defendant would contest, opposant's right to the property was unquestioned, and the court awarded it to him. Under such circumstances, Appellant asks for a reversal of the judgment of the court below. He seems to be under the impression that, for his amusement, Respondent is obliged to prove that the property which was seized in his possession is his, and this, while neither plaintiff or Defendant pretend that it belongs to Defendant, a course of proceeding which would enable a Plaintiff to use the power of the court to vex and harass third persons, while in the quiet possession of their property. By the opposition, Appellant is charged with having committed the tortious act of seizing Respondent's property while in his possession, in virtue of a writ against a third party. There being no denial of this fact, but, on the contrary, an admission of it from the absence of a contestation, the court did precisely the same thing that it would have done in an action of revendication if one had been brought by Respondent against Appellant, as a trespasser, for the recovery of his property illegally taken from him; it has rendered a judgment restoring it to him with the costs incident to the to the recovery of it. It may be observed that, in the district of Quebec, before the adoption of the above rule, the law and practice of the court there, was for an Opposant to call on Plaintiff and Defendant to declare within three days whether they intended to admit or contest an opposition, and, in default thereof to pray that the conclusions of the opposition be granted. If he did not so declare the rule was made absolute.

If he did so declare, but did not contest, the court always considered his declaration as no declaration at all, and awarded the conclusions of the opposition. This practice is co-eval with the existence of the courts of original jurisdiction in the district of Quebec, and the above practice, confirmed and established by the above rule, has been continued by the court below in rendering the above judgment. The costs in the whole matter have been taxed against Appellant at £4 4 8.

MEREDITH, Justice, *dissentiente*: The Appellant, as Plaintiff in the Court below, caused the goods and chattels of Defendant to be seized under a writ of execution. The Respondent by an opposition *afin de distraire*, claimed a portion of the goods so seized, and proceeding upon the rule of practice No 84 of the Superior Court, and following the course generally observed at Quebec, moved that the parties, Plaintiff and Defendant, should be held to declare within three days, whether they intended to admit or contest her opposition. On the motion so made, the Court rendered the following judgment: "The Court, having heard the parties, on the motion made, on the part of opposant, Jane Elizabeth Jamieson, that the parties, Plaintiff and Defendant, do declare, within three days, whether they intend to admit or contest the opposition *afin de distraire* by her Opposant filed, and that, in default of their so doing within the period aforesaid, the conclusions of the opposition be granted, doth order that the parties do declare within three days, as demanded." On the 4th of June, 1860, Appellant filed the following declaration: "The Plaintiff declares that he intends to contest the opposition *afin de conserver*, of Jane Elizabeth Jamieson, in this cause filed." The Plaintiff having omitted to file a contestation within the usual delay, Opposant demanded a plea to her opposition, and no plea having been filed, the Opposant thereupon foreclosed Plaintiff and obtained a judgment declaring that the delay for contesting the opposition had expired, and maintaining the opposition, with costs against Plaintiff, the present Appellant. The Judgment so rendered is now complained of on two grounds; first, because the rule to declare was not served upon the Defendant; and, secondly, because Opposant was not entitled to a judgment without proof, after Plaintiff had declared he intended to contest his opposition. As to the first of these objections, I may observe, that, as Plaintiff was foreclosed, after due notice to him, the proceedings are regular, so far as he is concerned; and, even if the proceedings are not regular as between Opposant and Defendant, that is not a matter of which Plaintiff can take advantage; and, in attempting to do so, he pleads a right vested in a third party, *il excipe du droit d'autrui*. On the part of Appellant it was however argued

that Plaintiff, as a creditor of Defendant, could avail himself of the rights of his debtor, the Defendant. It is doubtless true, as a general rule, that a creditor may exercise the rights of his debtor; but it does not therefore follow that a creditor may do so, as a matter of course, and merely of his own authority. The law of this subject is well explained by Proudhon, in his Traité de droits d'usufruit, from No 2227 to 2252; and there is a part of No 2241 which puts the matter so clearly that I think it well to quote it, after repeating the general rule: " Les créanciers peuvent exercer tous les droits de leurs débi- " teurs," the author observes, " mais pour cela il faut qu'un tri- " bunal compétent ait prononcé, au profit du créancier, sa su- " brogation dans l'action qu'il veut exercer: sans cette inter- " vention de la justice, l'entreprise que ce créancier voudrait " faire de sa propre autorité, et sans le consentement du débi- " teur, ne serait qu'une voie de fait, ou une invasion illicite " dans les droits de celui-ci. In the present case, Plaintiff has not been subrogated in any way in the rights of Defendant, and, therefore, cannot exercise those rights. It is however thought by one of the judges that the want of notice to Defendant is such a defect, *vice de procédure*, as to enable any party to take advantage of it. But, in that view I cannot concur. The want of notice is doubtless a *vice de procédure*, and it creates a nullity, but the nullity so created, is a *nullité relative*, confined to the party affected by it, and not a *nullité absolue* of which any one can take advantage. I now pass to the consideration of the objection that Opposant was not entitled to a judgment without proof, after Plaintiff had declared that he intended to contest her opposition. A Plaintiff, although resolved not to contest an opposition, may pursue either of two courses. He may refuse to file any declaration; or he may file a declaration that he intends to contest the opposition, and then refuse or neglect to file a contestation. The most usual course is to file no declaration; and, although that is not a literal compliance with the rule No. 84, yet, it has been uniformly held, from the time of the first promulgation of the rule, in 1824, until now, that the silence of Plaintiff, when put under a rule to contest, is equivalent to a declaration that he does not intend to contest. In such a case, it is plain that there is not a literal compliance with the rule of practice, because the rule of practice requires a certain *declaration to be made*; whereas, in the case supposed, *no declaration is made*. But, at the same time, the rule of practice is acted upon according to its true intent and meaning, by allowing Opposant to have judgment without proof upon his uncontested opposition. The only difference between the present case, and the cases in which

the course of practice above adverted to has invariably been pursued in this district, is that Plaintiff in the present case, has filed a declaration that he intended to contest the opposition, without, however, having afterwards filed a contestation. To me, it seems that a party ought not to derive any advantage from saying he will do an act, which he afterwards does not do, and I am therefore of opinion that the learned judge of the Court below was justified in treating Plaintiff who failed to file a contestation, exactly in the same way as if he had not said that he would file a contestation. It has however been contended that, according to our law, it is as impossible for the Court to grant an Opposant judgment without proof upon an uncontested opposition, as it is to grant a Plaintiff judgment without proof upon an uncontested demand. I think however that a Plaintiff and an Opposant are not on exactly the same footing. There are, it is true, some demands which, except as to costs, differ but little from oppositions, but, generally speaking, there is a very substantial difference between a demand by an opposition, and a demand by action. In an action for debt, which is much the most common form of action, Plaintiff, in effect, demands a judgment, under which, if necessary, he may cause the property of the Defendant to be sold, and the proceeds paid over to himself. But, by an opposition, such as that now before us, Opposant prays to be let have effects which he claims, and which the other parties have not claimed, although they have been afforded full opportunity of doing so. But be the analogy or the difference, between demands by action, and demands by opposition, what it may, it suffices for us to know that our Legislature have made a distinction between uncontested actions and uncontested oppositions. The old judicature act, 25th Geo. III, cap. 2, expressly required proof by a Plaintiff against Defendant, although the latter made default; but none of our judicature acts, or other statutes, expressly require proof in the case of uncontested oppositions. Acting upon the distinction thus made by the Legislature, the Court of Queen's Bench for this dictrict, during the time of Chief-Justice SEWELL, a judge whose name can never be mentioned otherwise than in terms of respect, promulgated the rule of practice from which the present rule No 84 has been taken. And it appears to me that the judges who have given their sanction to the rule, so promulgated by the late Court of Queen's Bench, or who have assisted in promulgating the present rule No 84, cannot contend that there is no differenee in law between an uncontested action and an uncontested opposition. Believing then as I do, that there is a material difference between an uncontested opposition and an uncontested action; and holding, as I do, that

parties before the Court are to be judged, not by what they say they intend to do, but by what they do, I think the judgment of the Court below right, in so far as it maintains the opposition of Respondent, to which no contestation has been filed, as an uncontested opposition; but I would deem it my duty to modify the judgment in so far as it condemns Plaintiff to pay costs. It is because Plaintiff has not contested the opposition, that I think it was rightly maintained without proof, and it is for the same reason, namely: that Plaintiff has not contested, that I think he ought not to have been condemned to pay costs. A Plaintiff who, in good faith and without negligence, seizes property in the possession of a Defendant, is not blameable, although such property may be found to belong to another. The general practice of the Superior Court, in this district, during the time that I had the honor to be a member of that Court, was not to condemn Plaintiff to pay costs in such cases. That practice then appeared, and still appears to me to be reasonable; and I see no sufficient reason for a deviation from it in the present cause.

BERTHELOT, Juge: Dans cette cause, il s'agit de l'application de la 84me règle de pratique, et de la 25me sec. de la 12me Vict. chap. 38, dans le cas d'une opposition afin de ditraire à une saisie mobilière. Le Demandeur ayant été appelé par une règle de Cour à déclarer s'il entendait contester ou admettre l'opposition, déclara qu'il entendait contester. Sur ce, il lui fut donné avis de plaider, et, ayant négligé de ce faire, l'Opposant fit motion pour jugement sur son opposition, attendu que ni le Demandeur ni le Défendeur n'avaient contesté son opposition. Jugement fut rendu en conséquence *avec dépens* contre le Demandeur. Il me paraît que ce n'était pas le cas de procéder à jugement sur l'opposition par motion ainsi que l'autorise la 84ème règle, qui pourvoit au cas où le Demandeur a déclaré qu'il n'entendait pas contester l'opposition, (1) tandis que, dans la présente instance, le Demandeur devait être considéré comme un Défendeur contre qui un Demandeur procède *ex-parte*, et il aurait fallu inscription à l'enquête et au mérite en la manière ordinaire, avec avis au Demandeur, que l'Opposant avait traité jusque là comme sa partie adverse. Il avait encore le droit de transquestionner les témoins et de plaider sa cause, quoique la procédure fût instruite *exparte* contre lui. Il avait droit à un avis *n'eut-ce été* que pour se défendre de

(1) Règle 84: That in every case wherein the Plaintiff shall declare *that he does not intend to contest an opposition afin d'annuler, afin de distraire ou afin de charge*, the Opposant shall be entitled to judgment of *main levée*, without proof: provided that the Defendant, upon the service of a rule *nisi* to that effect, shall not shew cause to the contrary, or declare that he intends to contest such opposition.

la condamnation des frais qui n'aurait pas dû être accordée contre lui. " Mais la partie forclose aura néanmoins droit " de recevoir, un jour franc d'avance, avis de l'inscription " de la cause pour enquête ou audition avant que l'enquête " ne soit commencée, ou que la cause ne soit entendue. " (1) L'Appellant se plaint aussi de ce que la règle pour l'appeler à déclarer s'il entendait contester l'opposition n'a pas été signifiée au Défendeur, et que, comme créancier du Défendeur, il avait le droit de faire valoir les moyens que ce dernier négligeait de faire valoir à l'avantage de son créancier ; mais on lui oppose que ce ne pourrait être que s'il y avait adjudication à cet effet, et là-dessus on cite Proudhon, *De l'usufruit*, nos 2227 à 2252. Je crois que ce n'est pas tout à fait l'occasion de faire l'application de cette autorité. Il faut remarquer que le Demandeur Appelant n'exerce pas à proprement parler les droits de son débiteur, mais il se contente de faire valoir un vice de procédure, que toute partie au record peut invoquer et relever avant qu'il y ait adjudication de la matière. Mais, indépendamment de cela, pour les raisons en premier lieu mentionnées, je ne vois pas de difficulté à dire que le jugement doit être renversé. La pratique dans le district de Montréal a toujours été de procéder par inscription, et d'en donner avis au Demandeur, assez souvent même dans les cas où il avait déclaré qu'il ne contestait pas. Mais, dans le présent cas, il y avait nécessité absolue, et l'Opposant ne pouvait pas se dispenser de donner l'avis requis par la clause du statut ci-dessus cité. Et c'est pour cette raison que le jugement de cette cour, infirme et renverse le jugement de la Cour Supérieure. Dans le district de Montréal, la question s'est présentée sous la circonstance suivante : Le protonotaire s'était refusé de mettre sur le rôle une opposition qu'un Demandeur avait déclaré ne pas vouloir contester, sans qu'il y eût une inscription au mérite, ce qui lui aurait donné droit à un émolument de 25s ou 30s. Pour lui, c'était une question de frais. Mais la cour, composée de trois juges, a décidé qu'il fallait une inscription pour entendre et juger l'opposition au mérite.

MONDELET, Justice : It is evident that Opposant had a right to proceed *exparte*, Plaintiff had forfeited his right to adduce evidence, but, had a right to cross-examine such witnesses as Opposant would examine. Instead of pursuing that course, which, of necessity, obtains upon oppositions as well as upon actions, interventions and all proceedings *exparte*, (not by default) the court, without any notice to Plaintiff, adjudged that, inasmuch as neither Plaintiff nor Defendant had contested the opposition, the conclusions of the same should be

(1) Stat. Ref. B. C., p. 720, sec. 13, No 2, ou 12 Vict., ch. 38, sec. 25.

granted, and, on the 5th November, following, the court rendered judgment maintaining the opposition, and, in consequence, ordering that from the seizure of moveables effected distraction may be made in favor of Opposant, of the goods, chattels &c., claimed in the opposition, and granting *main-levée* of the seizure thereof, to opposant. Such a judgment is untenable, it is altogether wrong in its principle, or rather in the conclusion drawn from the existence of a fact, to wit: "that the opposition hath not been contested, and that the delay so to do, hath expired," it by no means follows that opposant is to get judgment, no more than a plaintiff is to obtain judgment, because Defendant has not pleaded to the action, and that the delay so to do hath expired. The learned judge must have misconceived the meaning of the 84th rule of practice, and misapplied it to a case which it has no legal bearing upon: "That, in every case wherein the Plaintiff shall declare that *he does not* intend to contest an opposition *afin d'annuler*, *afin de distraire* or *afin de charge*, the opposant shall be entitled to judgment of *main-levée* WITHOUT PROOF, provided that the Defendant, upon the service of the rule *nisi* to that effect, shall not shew cause to the contrary, or declare that he intends to contest such opposition." Rule 84. This is no case of a Plaintiff declaring that he does not intend to contest the opposition, it is the very reverse, he has declared that he intends to contest the opposition. The Defendant has not, according to the latter part of the rule, been called upon to show cause to the contrary, for the very best reason, to wit: Plaintiff had declared "he intended to contest." As was remarked, all that could be done by opposant, was to proceed *exparte*, and prove her opposition, subject to the right of Plaintiff to cross-examine the witnesses. As to what is said by opposant, touching the practice in the district of Quebec, I do not think it can have any influence on the decision we ought to arrive at. Here are principles of procedure familiar to every one; there is a rule (84th) of practice which is exceptional, and which being inapplicable to the present case, cannot of course take it out of the *general* rule. Besides, is not an Opposant in the position of a Plaintiff? Is it sufficient for him to allege, is he so far privileged, that he may obtain his conclusions without having proved his allegations to be true and well founded? A Plaintiff cannot get a judgment even for a few shillings, unless he substantiates his demand by sufficient legal evidence; if Defendant has appeared and is proceeded against *exparte*, for want of a plea, after he has been called upon to file one, is he to be condemned without a case made out against him; and this upon an opposition, whereby property to any amount may be, and often times is, claimed. Is Opposant to have judgment

without having proved anything, and why ? Because, contrary to every principle of *procédure*, people choose to jump, all at once, at a conclusion which logic and justice equally repudiate, and invoke the undue and unjustificable application of a rule of practice which has no bearing whatever upon the present case; and what is worse, we have a judgment whereby it is made manifest that the party most interested in the matter, has not even been heard; a judgment which, let it be well and clearly understood, should be reversed, and the parties ordered to proceed as in a case *exparte*, all the proceedings since the foreclosure having, of course, to be set aside. My opinion is founded on principles of common law and justice, principles which cannot be disregarded, without striking at the very root of a safe system of *procédure*, and which no practice can or ought to be allowed to subvert. Were I to seek in recent statutes enactments to show how forcibly such principles have impressed the legislature, I would say that even when you have obtained leave to proceed *exparte*, for want of a plea, you are not allowed to go into evidence, without due notice to the adverse party; and, again, whether your opponant has or has not cross-examined your witnesses, you are bound to give him notice of the inscription on the merits. I don't mention this as being the law of this case, I allude to it merely to show that the legislature, in enacting such rules, (which I think were unnecessary) has been moved by reasons which are no more than the true expression of common justice. In this very court, the same principle is recognised and acted upon; look at rule XIII; the party for want of reasons filed, proceeds *exparte*, but has to give notice of the inscription for hearing on the merits. It seems to me, that much confusion arises out of a want of distinguishing between a cause by default and one *exparte*, and even in a case by default, are you to get judgment without having proved your case ? surely not; and, then, is the case of an opposition to be a gratuitous exception, to be justified by the violation of the most elementary and fundamental principles of justice, of law and procedure, and attempted to be sustained by the illogical application of a rule of practice never made for, nor in the least bearing upon such a case as the present, and which is turned into a compressed and compressing machinery to manufacture a nay into a yea, and to make black appear white ? It is a clear case, and, in my opinion, the judgment should be reversed, and the parties ordered to proceed as in a cause *exparte*, all the proceedings since the foreclosure having of course to be set aside.

The court seeing that Respondent, by her opposition in the court below, prayed, in her conclusions, for costs against Appellant who was Plaintiff *saisissant*. Seeing that Appellant, when

ruled by Respondent to that effect, declared that he intended to contest the opposition. Seeing that, on the 2nd day of November, 1860, Respondent filed a paper writing styled foreclosure, and that, pursuant to the 83 chap. sect. 13, sub-section 2 of the Cons. Stats., Appellant was entitled to at least one clear day's notice of the inscription of the cause for *enquête*, or hearing, before such *enquête* should be commenced, or the cause should be heard. Seeing that Respondent, contrary to law, omitted to give notice to Appellant of the inscription as required, and that, therefore, in the judgment of the court below, by which the opposition of Respondent was maintained, with costs, there is error, it is considered and ordered that the judgment, rendered by the Superior Court, at Quebec, on the 5th day of November, 1860, be and the same hereby is reversed, annulled and set aside; and, proceeding to render the judgment which the court below ought to have given, it is futher considered and adjudged that the motion of Respondent, on the 2nd day of November, 1860, that the conclusion of the opposition should be granted, on the contrary, be rejected and dismissed, and that the parties do stand in the same plight and condition as that in which they stood on the said day when the motion was made, &c., *dissentientibus*, DUVAL and MEREDITH. (13 *D. T. B. C.*, p. 417.)

HOLT and IRVINE, for Appellant.

STUART and MURPHY, for Respondent.

GAGES DES MATELOTS ETRANGERS.

CIRCUIT COURT, Québec, 26 octobre, 1863.

Before: TASCHEREAU, Justice.

PATEZ, et al., *vs.* KLEIN.

Jugé: 1o. Que, dans les actions pour gages, par des matelots étrangers contre le capitaine de leur vaisseau, un bâtiment étranger, le témoignage du capitaine, quant à la validité de l'engagement des matelots et le droit qui régit tel engagement, sera admis.

2o. Que, dans un voyage tel que celui mentionné dans le contrat en question, des matelots Russes sont tenus de servir à bord du vaisseau jusqu'à leur libération dans le port qui complète le voyage.

The Plaintiffs were sailors, and brought their actions against Defendant, who was captain of the Russian ship "Wjatka," and claimed from him their wages as seamen on board of the vessel. The Defendant pleaded a subsisting contract, and that Plaintiffs were not entitled to their discharge until the vessel arrived in England, at the port at which they had shipped. The Defendant was examined to prove the ship's articles and

the Russian law in relation to matters of this kind. The evidence of the captain was objected to, and the objection reserved.

HEARN, for Plaintiffs: The first point on which it is necessary for me to touch, is the right of the captain to give evidence in his own favor on any question whatever in this Court. The cap. 36, sec. 12, Con. Stat L. C., referred to by the counsel for Defendant, has no application whatever in this Court, for, by that act, it is provided that the oath of the master shall be taken in prosecutions against seamen for desertion, before a justice of the peace, and the 12th section extends this privilege to the masters of foreign merchant vessels, but it cannot be pretended, and no authority can be brought to show, that either Defendants or Plaintiffs in suits before this Court, can, of their own accord, give evidence in their own favor. The right accorded to masters of vessels, by the act referred to, is a very great favor and privilege, and ought not to be extended beyond the express provisions of the law. The evidence of the master must therefore be struck out, and there remains no evidence whatever concerning the mariners' contract, or of the Russian law. These cases cannot then be decided according to the Russian law, but, besides this, there is no reason why they should be so decided, the ship's articles were, it is pretended, signed in England, and there is no necessity on the part of the captain to bring back his sailors to Russia. The question will therefore be governed by the laws of England. The Plaintiffs have the right to receive their discharges and to recover their wages here in Quebec, because the contract entered into between Plaintiffs and Defendant, as shown by the ship's articles, is not binding on Plaintiffs, being of a most indefinite nature, and for a most indefinite period: by these articles, Plaintiffs would be bound to the ship, to remain by her and to work on board of her for ever, if one might so speak, and this without receiving any wages or any remuneration for their services; for, by the articles, they are bound to sail to several ports mentioned in the articles, and from the last one mentioned to some inland port, or elsewhere; this word *elsewhere* alone is, it will be seen by the authorities cited, sufficient in itself to vitiate the articles, but, when taken in connection with the indefinite length of the voyage, and the absence of any period fixed for its duration, it will convince this court that the articles are an absolute nullity, and that the seamen engaged under them are entitled to their wages and to be discharged.(1)

(1) Authorities cited by Counsel for the Plaintiffs: Mariners, especially foreigners, are in an eminent degree *inopes consilii* and the Court gives them every relief in its power, consistently with the justice due to other parties,

ALLEYN, The Hon. C., for Defendant: This question is not to be decided by the law of England, although even by that law it could, I believe, be established that Defendant is entitled to retain Plaintiff's, and the other seamen who have signed his articles, on board of his ship until the end of his voyage. By the Russian law which governs this case, the crew are bound to return to some port in Europe, as agreed to in the articles. The principle is that the men are bound to go with the ship, and cannot be paid off or discharged until the ship has arrived at her port of destination. (1) I might even go a step further and say that a seaman is not entitled to receive any money whatever from his captain in any foreign port. The nature of the Russian law, in regard to this matter, has been most clearly proved by the captain, whose evidence

The Madonna D'Idra, 1 Dodson, p. 39; Pritchard's Admiralty Dig., p. 270; Mariners are the favorites of the law and placed particularly under its protection, The Minerva, 1 Hagg., p. 358; It is the duty of the Court to protect mariners from injustice, The Jupiter, Hagg., p. 221; The Court is anxious to protect mariners against circumvention and even misapprehension and error, The Hoghton, 3 Hagg., p. 112; The Court will entertain suit for wages in the case of a foreign ship belonging to an alien enemy, The Vrow Mina, 1 Dodson, p. 234. *Specification of voyage*: A mariner is entitled to know where the voyage is to be directed, The Eliza, 1 Hagg., p. 186; The Minerva, 1 Hagg., p. 350; The mariner is entitled to know what is the precise voyage for which he undertakes to contract, however slight the deviation of the destination of the ship the mariner is entitled to know it before signing articles, The Countess of Harcourt, 1 Hagg., p. 248: In the construction of special agreements the Court will take into consideration the disparity of intelligence between the contracting parties, and lean to afford protection to the mariner, The Minerva, 1 Hagg., p. 355: In the construction of the mariners' contract, the Court will give to the mariner the benefit of any doubt arising thereon, The Hoghton, 3 Hagg., p. 112: The mariner has a right to be informed of the voyage, The George Hume, 1 Hagg., p. 375: The Westmoreland, 1 W. Rob., p. 226. As to the word *Elsewhere*: The Minerva, 1 Hagg., p. 347 and 361: Deviation entitles mariner to his discharge, The Cambridge, 2 Hagg., pp. 247 and 252: 2 Peters, p. 415: No stipulation to the disadvantage of seamen is allowed to stand as part of the contract, Ship Master's Assistant and Commercial Digest: Alien enemies are at liberty to sue in British Courts for wages earned by them as mariners, Pritchard's Adm. Dig., p. 598: The master is not competent as a witness, 2 Abbot, p. 796, in the note.

Les tribunaux, en Angleterre et dans les Etats-Unis, paraissent disposés à prendre connaissance des poursuites par des marins étrangers contre le maître du vaisseau, quand le voyage est terminé ou qu'il a été abandonné, ou que l'engagement est dissous par l'acte du maître, et ils prennent connaissance de la *lex loci* pour constater l'engagement. L'acte du congrès des Etats-Unis exige que l'engagement constate le voyage ou le terme du service pour lequel le marin est engagé, c'est-à-dire, qu'il déclare d'une manière explicite les ports d'où le voyage doit commencer et où il doit se terminer, soit que l'engagement soit fait pour un certain nombre de ports ou de pays, ou pour un temps limité. Si l'engagement ne détermine pas la fin du voyage, il est nul, et le marin peut poursuivre pour ses gages dans aucun port à l'étranger. Un engagement nul pour cette cause ne lie pas le marin quant à la déclaration qu'il contient de ne pas poursuivre pour ses gages avant que le vaisseau soit rendu à un dernier port de déchargement. (*Carroll*, vs. *Ballard*, C. C., Québec, 21 décembre 1861, TASCHEREAU, juge, 12 *D. T. B. C.*, p. 247.)

(1) See Abbott, on Shipping, 7th English, Ed: page 636.

I maintain must remain of record, for, if the case is directed personally against the captain, he is entitled to state the nature of the contract entered into by himself and the sailors, his servants, and, if the action is directed against the owners of the vessel, then the captain will be a competent witness for the defence, as an agent brought up to establish the contract entered into for his principal.

TASCHEREAU, Justice: If these cases had to be decided according to the law in force in this Colony, I should have little hesitation in deciding them against Defendant, as the ship's articles in question are of such an indefinite character as to be almost valueless according to our law. But, unfortunately for plaintiff's pretensions, the question of his contract has to be decided according to the laws in force in Russia, for, although the articles in question were signed within British jurisdiction, they are Russian articles, and were signed on board of a Russian ship, and under the Russian flag, and the contract entered into by the parties to those articles must be held to be a Russian contract. The only difficulty which presents itself to my mind is as to what are the provisions of the Russian law with regard to this matter. The captain tells us that the articles are good, according to the Russian law, Plaintiffs' witnesses say they are bad. I am inclined to accept the captain's version of the law, rather than that given by the sailors, but the question arises, is the captain a competent witness? Precedents are to be found in which the testimony of the captain has been admitted, even in cases in which he has been sued personally in damages, but there are cases reported both for and against the admission of such evidence; and, as very much is left to the discretion of the Court, I have determined to accept the testimony of the captain, which, being admitted as good, must decide the whole case, as the captain, who is a most intelligent man, and also another Russian captain examined ou behalf of the defence, have both sworn positively that the articles in question are valid and binding according to the Russian law under which they were made. Judgment: Action dismissed. (13 *D. T. B. C.*, p. 433.)

HEARN, for Plaintiffs.

ALLEYN and ALLEYN, for Defendant.

VENTE.—GARANTIE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 7 septembre, 1863.

Before: DUVAL, MEREDITH MONDELET, and BERTHELOT, Justices.

LEDUC, Appellant, *and* SHAW, *et al.*, Respondents.

Jugé, en Cour Supérieure, Montréal: 1° Qu'un acheteur qui a reçu partie d'une quantité de farine vendue à l'échantillon, a droit, lorsqu'il est poursuivi pour le prix, à une réduction, égale à la moins value de la farine reçue, telle farine étant inférieure à l'échantillon.

2° Que l'acheteur est tenu sur réception de la farine de la faire examiner sans délai, et d'offrir de la remettre; et qu'une offre et un protêt notarié du 21 juillet, était tardif, la vente et livraison ayant été faite le 19 juin, 1860, quoiqu'avis verbal de la mauvaise qualité de la farine eût été donné aux courtiers le 27 juin.

3° Que l'acheteur ayant vendu une partie de la farine, n'avait pas le droit de faire rescinder la vente pour le résidu de la farine reçue.

Jugé, en appel: 1° Que les offres de remettre cette partie de la farine qui restait entre les mains de l'acheteur, étaient des offres valables; et que la confession de jugement offerte dans l'un des plaidoyers pour la balance du prix était suffisante, et aurait dû être acceptée.

2° Que l'acheteur était en droit de déduire, comme partie de ses dommages, les frais de transport à ses pratiques à la campagne, auxquelles partie de la farine avait été envoyée sans être examinée, et aussi la réduction faite sur le prix de la vente à ses dites pratiques.

This was an action brought to recover $373.85, for the price and value of seventy seven barrels "Collingwood Mills" flour, (No. 2 unbrandable), sold and delivered by Plaintiffs to Defendant, on the 19th June, 1860, at the rate of $4.85 per barrel. By the judgment appealed from, Plaintiffs recovered at the rate of $4.05 per barrel, being a reduction of 4s. per barrel, on account of the inferior quality of the flour delivered, as compared to the sample by which it was sold. The Plaintiffs employed Rae & Mitchell, brokers, to sell a quantity of one hundred and seventeen barrels "Collingwood Mills" flour, by sample. The sale took place, but only seventy-seven barrels were received, although a delivery order was given for the whole lot to Defendant by the brokers, and the action was brought for the recovery of the price of the flour delivered. The Defendant pleaded the purchase, on the 19th of June, 1860, by him, from Rea & Mitchell, brokers, acting for Plaintiffs, of 117 barrels "Collingwood Mills" flour, No. 2 unbrandable, by sample produced by them, at $4.85 cents per barrel. Then followed an allegation: "Que les Demandeurs livrèrent "ensuite au Défendeur, une partie seulement de la farine, "savoir, 77 barils, au lieu de 117, et que le Défendeur, *sur la foi* "*de la garantie à lui faite de la bonne qualité de la farine* "*susmentionnée*, vendit lui-même, *sur le même échantillon*, "vingt barils de la farine à Cyrille Magnan, de la Rivière du

" Loup, et vingt-quatre barils à Guilbault et frère, de l'In-
" dustrie, ses pratiques, *leur garantissant que la farine était*
" *de bonne qualité, et en tout semblable à l'échantillon.*" The plea then set up notice on the 27th June, to Rae & Mitchell, that the flour was inferior to sample, and, on the 21st July, to Plaintiffs, by notarial protest, of the bad quality of the flour, and calling on them to take away what was on hand. and deliver good flour instead. Then followed an allegation, that the 44 barrels were sold at 26s. per barrel, making a profit of £3 17 0d; that the flour was really worth four shillings less than the purchase price. The plea then set up that Magnan, " s'étant aperçu que la farine était sure, et qu'elle n'était pas " de la condition et valeur à eux garantie," complained of the bad quality of the flour, and sent back ten barrels to Defendant, at Defendant's costs and charge, consenting to keep the ten remaining barrels not sent back " en exigeant toutefois du Défendeur une déduction sur le prix de trois schellings courant par baril." The plea then set up a similar allegation as to the 24 barrels sold to Guilbault et frère, the deduction made by Defendant on the 24 barrels referred to was £16 8s. 2d. That he had 39 barrels on hand which he had not sold, but was ready to hand over. That the whole price of the 77 barrels at $4.85, was £93 7 3. Deducting the 39 on hand £47 5 9. Leaving £46 1 6. From which he offset damages in compensation to the amount of £16 8 2 leaving £29 13 4. This last sum he offered to pay, and confessed judgment for, with interest from service of process. By his conclusions, Defendant prayed act of his offer to deliver back the flour, and to confess judgment for £29 13s. 4d., and that Plaintiffs be condemned to take back the 39 barrels still in Defendant's premises; and that, thereby, their demand be reduced to £46 1s. 6d., and this latter sum be declared compensated to the extent of £16 8s. 2d.; and that judgment be not rendered against Defendant except for £29 13s. 4d, with costs against Plaintiffs, if the offer were not accepted. The second exception set up simply that the flour was worth 4s. per barrel less than the sum demanded, making for the 77 barrels a deduction of $61.60, and leaving due a balance of $311.85. Conclusion, that judgment be rendered only for $311.85, and Plaintiff's action dismissed for any larger sum, reserving, however, Defendant's rights under the first exception. The answer to the first plea was to the effect that the flour sold, was not flour of first quality, nor was its price that of such quality of flour; that Plaintiffs notified Defendant they were willing to deliver the whole quantity, or that they would take back what had been delivered, if Defendant would restore it back, but that Defendant had refused to deliver it. Judg-

ment was rendered for Plaintiffs to the effect stated in the abstract above. It was from this judgment that Defendant, Leduc, instituted an appeal. (1)

MEREDITH, Justice, *dissenting* : I agree with the other judges in saying that the flour delivered was inferior to the sample; and that, under the circumstances of the present case, Appellant had a right, when the inferior quality of the flour was ascertained, to return the flour remaining unsold; and I believe the other judges agree with me in opinion, that if Appellant wished to return the flour, he was bound to do so without unreasonable delay. The first point then respecting which we differ is that, in my opinion, there is no evidence of Appellant having ever made a sufficient offer to return the flour, or of Respondents having done any thing to relieve Appellant from the necessity of making such offer. The protest, of the 27th of June, was served upon the brokers, Rae and Mitchell, and not upon Respondents, and the protest of the 21st July was too late. But, it is said that the conduct of Respondents was such as to relieve Appellant from the necessity of making a tender of the flour. The best evidence as to this point is that of Mitchell, who says: "I am aware that, within a short time after the sale of the flour, Defendant notified us that the flour was sour. I, at once, went and informed Plaintiffs, who directed me to tell Defendant that they were ready to receive back the flour. I did notify Defendant to that effect, but he declined to send back the flour, unless he was paid for his expenses of transport." Leduc says: "Mitchell "m'a dit, de la part de Shaw, que ce dernier reprendrait la "fleur, mais sans frais de transport ni autres." These statements differ from each other very materially, and choosing between them, as we must do, I hold that the evidence of Mitchell, as to the statement made directly to himself, by Respondents, is preferable to the evidence of Leduc, relating to the same statement, coming to him as it did through Mitchell. Assuming then that the statement of Mitchell is the best evidence as to this point, all that we know is, that Respondents directed Mitchell to tell Appellant that they were ready to receive back the flour. There was certainly nothing wrong in this declaration, and I do not think that we can consider the spontaneous offer, thus made, equivalent to a declaration that, in the event of a tender of the flour, by Appellant, subject to the payment of

(1) Appellants' authorities: Pothier, *Vente*, Nos. 69, 71, 217, 227; 2 Troplong, *Vente*, Nos. 557, 558; 1 Duvergier, No. 413; 16 Duranton, No. 319; Domat, liv. 1, sect. 9, No. 6; 2 Zachariæ, sect. 355, page 527, note 43.

Respondent's authorities: Pothier, *Vente*, Nos. 259, 260; 2 Pardessus, Nos. 282, 284; 4 Gouget et Merger, *Dict.*, vbo. *Vente*, Nos. 123, 124, 126, 195, 196; 4 Massé, Nos. 60, 242.

the costs of conveyance, Respondents would refuse such a tender. The second point in the case, as to which I differ from the other judges, is as to the effect that ought to be given to the protest of the 21st July. By that protest, Appellant informed Respondents that, if they did not take back the flour, he would, as he had a right to do, sell it on their account, and at their risk. The Respondents did *not* take back the flour, and yet Appellant did *not* sell it, as he had formally notified Respondents he would do, on the contrary, he kept it during the latter part of June, and all the months of July, August and September, and up to the filing of the plea in October, and then, when sued, offered to return it to Respondents. My learned brethern, as I understand, maintain that he had then a right to do so; but in that opinion I cannot concur. There is no proof that the flour, which had commenced to heat in June, remained in the same state until October, and it is contrary to the nature of things that it could have done so. The damage, comparatively speaking, would have been trifling, had Appellant, in pursuance of his notice, sold the flour in July; and I think that Appellant, having formally notified Respondents that he would pursue the course of selling, had not a right, without the consent of Respondent, and without notice to them, to pursue a contrary course, to their serious detriment. I am, therefore, of opinion, that the judgment of the Superior Court, which condemns Appellant to pay, *not the contract price*, but the *actual value of the flour* received by him, and which refuses to Appellant the right of returning in October the flour which, in the month of July, he notified Respondents he would sell, ought to be confirmed. At the same time, I do not hesitate to say, that if Appellant had not held over the flour, contrary to his own notice, all the equities of the case would have been on his side, for it is certain that the flour delivered was inferior to the sample, and that Respondents, when made aware of this, did not show that readiness to do Appellant justice, and to relieve themselves from suspicion, which, irrespective of higher considerations, even as men of business, they ought to have evinced.

BERTHELOT, juge : Les Demandeurs poursuivaient le Défendeur pour $373.85, prix et valeur de 77 barils de fleur vendus et livrés le 19 juin 1860. Le jugement ne leur a accordé que $4.05 par baril. étant une deduction de 4 schellings par baril, à raison de la mauvaise qualité de la fleur qui avait été vendue sur échantillon, à raison de $4.85, par l'entremise de Rae & Mitchell, pour une plus grande quantité, 117 barils. Mais il a été refusé aux Défendeurs la résiliation de la vente quant à 39 barils qui leur restaient, n'en ayant revendu que 44, le jour même, sur le *même échantillon* sur lequel il avait acheté.

Le motif du jugement, sur ce point, est, que l'acheteur n'avait pas répudié les choses vendues assez tôt, et qu'au contraire *il avait revendu* partie de cette quantité de fleur, " without " having claimed his right to rescind the sale as he might " have done in law." Je ne trouve pas que céci soit vrai. Il est de fait, que la revente de partie de ces barils de fleur a eu lieu le jour même de l'achat, le 19 juin, et que l'achat et les reventes ont été faites sur le même échantillon, c'est-à-dire: sur l'échantillon que Mitchell, le *broker* des Demandeurs, a montré et laissé au Défendeur. Comment peut-on donc faire un reproche à ce dernier d'avoir revendu la fleur sans auparavant s'être plaint au vendeur, ou à son broker, de la mauvaise qualité de la fleur livrée en barils. La preuve constate que les 44 barils revendus à Guilbault et frère, de l'Industrie, et à Magnan de la Rivière du Loup, n'ont pas *même passé par le magasin du Défendeur* pour se rendre aux steamboats, lieu de la livraison. Le 19 juin au soir, 31 barils furent livrés aux magasins du Défendeur, et le commis et témoin de ce dernier, Denis Leduc, qui avait fait l'achat, dit que, le lendemain matin, vers 7 heures, il s'est aperçu que la fleur était chauffée, et il en conclut, en introduisant la sonde, qu'elle avait dû chauffer depuis 12 ou 15 jours. Il continue ainsi: " Le même jour, c'est-à-dire, le vingt de juin, j'ai montré cette fleur à Mitchell, et il est *convenu* avec moi que la fleur n'était pas convenable pour l'échantillon, et qu'elle n'était pas de la qualité qu'elle devait être. Cette fleur, à l'inspection, avait été marquée du mot " rejected," c'est ce que nous appelons en français, " fleur chauffée." Sur ce fait de la mauvaise qualité de la fleur, il ne peut y avoir de doute. Il est même admis par le jugement. Plus loin, le témoin continue ainsi: " Le vingt juin, dans l'avant midi, après avoir examiné la fleur que nous avions *reçue des Demandeurs, je suis allé avec une autre personne au magasin des Demandeurs eux-mêmes, et nous avons examiné les quarante-deux barils de fleur formant la balance des cent dix-sept barils sus-mentionnés, et nous l'avons trouvée telle que celle qui nous avait été livrée, c'est-à-dire chauffée et en aussi mauvais état.* Après avoir examiné cette fleur je suis allé chez Rae et Mitchell pour les informer du mauvais état de cette fleur, et ils m'ont répondu qu'ils en informeraient M. Shaw. Deux ou trois jours après, Mitchell *m'a dit, de la part* de Shaw, que ce *dernier reprendrait la fleur, mais sans payer aucuns frais de transport* ni autres. Les Demandeurs ne sont jamais venus chercher la fleur après cette époque. Il reste encore au Défendeur trente-sept des barils de fleur sus mentionnés, vû leur mauvaise qualité." Ce témoignage est corroboré par celui de Mitchell, le témoin du Demandeur, celui par l'entremise de qui la vente a été faite.

" I am aware that within *a short time after the sale of the* " *flour*, Defendant notified us that the flour was sour. I at " once went and informed Plaintiffs, who directed me to tell " Defendant *that they were ready to receive back the flour*. I " did notify Defendant to that effect, but he declined to send " back the flour, *unless he was paid for his expenses of trans-* " *port*. The price for which the flour was sold was the ordi- " nary and market price for such flour at the time. I think " the sale was made on the 19th of June, 1860 ; the date of " the actual delivery I do not know. On the order for the de- " livery of the flour which I gave Defendant, he could have " obtained delivery of all the flour, had he chosen to do so. " Je ne puis voir comment l'on peut imputer au Défendeur de ne pas avoir répudié la vente assez tôt, lorsqu'il est bien prouvé que dans l'avant-midi du 20, peu d'heures après avoir eu l'occasion de voir et examiner les barils de fleur qui lui avaient été livrés, il s'en plaint à Mitchell, le courtier par l'entremise duquel il avait contracté avec les Demandeurs. Il est bien vrai que ce n'est que le 27 juin qu'il a fait signifier à Rae et Mitchel une notification, par notaires, de la répudiation de la vente, et que ce n'est que le 20 juillet qu'il a fait faire la même signification aux Demandeurs eux-mêmes, mais l'une et l'autre de ces notifications doivent remonter et se relier à ce qu'il a communiqué à Mitchell, dès le 20, et que ce dernier avoue avoir communiqué aussitôt aux Demandeurs qui lui auraient dit qu'ils étaient prêts à reprendre la fleur, mais sans payer aucun frais de transport ni autres frais, ce qu'il communiqua au Défendeur qui déclina de la renvoyer à moins qu'il ne fût payé pour les frais de transport. Le Défendeur avait raison de ne pas vouloir encourir de nouveaux frais de transport ; et les Demandeurs qui reconnaissaient avoir vendu de la fleur de mauvaise qualité, et autre que celle de l'échantillon, auraient dû renvoyer chercher à leurs frais leur mauvaise marchandise. La bonne foi qui doit régner dans tout contrat de vente leur en faisait une obligation formelle, et ils auraient dû se prêter immédiatement à ce qui était demandé d'eux. Quant à ce que l'on dit sur l'insuffisance de la répudiation du contrat, ou sur l'obligation où pouvait être l'acheteur de remettre la quantité de barils de fleurs qui lui restait, il ne pouvait être tenu à plus que ce qu'il a fait, offrir de les remettre. Il ne pouvait être tenu ni en loi, ni en équité, à encourir de nouveaux frais de transport. Les Demandeurs étant en faute, c'était à eux de reprendre les choses vendues de mauvaise qualité, à leurs frais et dépens. Je pourrais même dire, que l'on ne devrait guère s'attendre à de pareilles difficultés de la part de négociants qui tiendraient à une haute réputation d'exactitude dans leurs transactions.

MONDELET, Juge: J'ai réfléchi à cette cause, et je suis d'avis que le jugement de la Cour Supérieure qui établit en trouvant avec la preuve que l'Appelant au lieu d'avoir tort, a eu droit de se plaindre, est incorrecte, là où il refuse à l'Appelant ce qu'il réclame, c'est-à-dire, ou que l'Intimé reprenne à ses frais les 27 barils de fleur chauflée, ou qu'il lui en paie la valeur. La Cour de première instance pouvait, et devait, résilier la vente pour partie, et l'Appelant s'est plaint à temps, le 20, le lendemain de la vente. On ne peut lui imputer faute de ne l'avoir pas fait plus tôt, et c'est par ceux à qui il a vendu de cette fleur à l'échantillon, qu'il a découvert la mauvaise qualité de cette fleur. Du 20 au 27 ou 28, jour du protêt, lequel protêt n'était que la suite et la répétition de la plainte du 20, il ne s'est écoulé que quelques jours, sans doute parce que sur la plainte du 20 il y a eu, et devait y avoir, quelques pourparlers. D'ailleurs, les Intimés ont émis une prétention insoutenable; ils consentaient, disaient-ils, à reprendre la fleur, mais à condition qu'elle leur fût renvoyée aux frais et dépens de l'Appelant. C'est insoutenable. La partie du jugement qui accorde à l'Appelant l'avantage d'une certaine diminution sur le prix, à raison de la mauvaise qualité de la fleur, est exacte, et devra être conservée dans la rédaction du jugement que rendra la Cour d'appel. J'opine donc pour l'infirmation du jugement de la Cour de première instance.

JUDGMENT IN APPEAL: "Considering that the present action is instituted for the recovery of the price of seventy-seven barrels of flour sold and delivered by Respondents to Appellant, and that of the flour so sold and delivered to Appellant, thirty-nine barrels are proved to have been of an inferior quality, and such as Appellant was not bound to accept, and which thirty-nine barrels of flour Appellant offered, before the institution of this action, to return to Respondents, leaving a balance of £46-1, 6, due to Respondents for their flour: Considering that, by reason of the inferior quality of the flour in the remaining thirty-nine barrels retained by Appellant, Appellant hath sustained damage to the amount of £16, 8, 2, which latter amount Appellant has a right to set off in deduction of the amount of £46, 1, 6, leaving a balance of £29, 13, 4, due to Respondents: Considering that of the facts above set forth, Respondents were notified in due time, and an offer made to them to return the thirty-nine barrels of flour of inferior quality above stated: Seeing that Respondents acknowledged the inferior quality of the flour in the said thirty-nine barrels contained, and offered to take back the same, but on conditions which Appellant was jutisfied in rejecting: Seeing that Appellant, by his plea of peremptory exception, hath offered to deliver up to Respondents the thirty-nine

barrels of flour, and that for the balance of £29 13 4, acknowledged to be due to Respondents, Appellant offered to confess judgment, with costs up to the day of the confession; this court doth declare the offer of Appellant good and valid, Respondents not being by law entitled to claim more from Appellant, and, in consequence, doth declare that, in the judgment pronounced by the Superior Court at Montreal, on the 13th day of December, 1861, condemning Defendant, Appellant in this court, to pay to Plaintiffs the sum of $311.08, being the price and value of seventy-seven barrels of flour, at the rate of $4.85, per barrel, sold and delivered by Plaintiffs to Defendant with interest upon the sum of $311.08, from the 22nd day of August, 1860, date of the service of process in this cause, until actual payment, and costs of suit, there is error, this court doth reverse and set aside the judgment so pronounced by the Superior Court, at Montreal, on the 13th day of December, 1861, and doth thereby declare the offer made by Appellant, to confess judgment in favor of Plaintiffs for the sum of £29 13 4, with interest from the date of the service of process and the costs of an action of that class, up to the day of such confession, good and valid, and doth condemn Appellant to pay to Respondents the said sum of £29 13 4, with interest, from the 22nd day of August, 1860, and costs up to the day of the confession, dismissing the demand of Respondents for the sum exceeding this last mentioned sum. The honorable Mr. Justice MEREDITH, dissenting. (13 *D. T. B. C.*, p. 438.)

FABRE, LESAGE and JETTÉ, for Appellant.

ROBERTSON, A. & W., for Respondents.

CAUTIONNEMENT EN APPEL.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 2 juin, 1863.

Before: AYLWIN, MEREDITH, MONDELET, and BERTHELOT, Justices..

BEAUDET, Appellant, *and* PROCTOR, Respondent.

Jugé: 1° Qu'un cautionnement sur un appel de la Cour de Circuit, sera déclaré insuffisant, et l'appel renvoyé, avec dépens, si le cautionnement n'est signé que par une caution, et ne contient pas une désignation de ses propriétés immobilières. (1)

2° Que la motion pour renvoyer l'appel faute de cautionnement suffisant, n'était pas faite tardivement, quoiqu'un terme fût intervenu depuis la condamnation de l'Intimé, particulièrement lorsque le retour du greffier de la Cour de Circuit était irrégulier.

(1) V. art. 1939, C. C., et 1122 C. P. C.

Appeal from Circuit Court, returned 2nd March, 1863. The Respondent appeared 25th February, 1863; and, on the 1st June, 1863, a motion was made to dismiss the appeal for want of sufficient security.

JUDGMENT: Considering that the security given by Appellant is insufficient, inasmuch as the bond is signed by one surety and does not contain any description of the real estate of which the surety is alleged to be the proprietor; and, considering that the motion of Respondent for the rejection of the appeal was not made too late, inasmuch as, even at present, there is not a regular return before this court to the writ of appeal therein issued, doth, in consequence, grant the motion, and doth dismiss and reject the appeal, with costs. (13 *D. T. B. C.*, p. 450.)

BURROUGHS, for Appellant.

CROSS, for Respondent.

RESOLUTION DE VENTE FAUTE DE PAIEMENT DU PRIX.

SUPERIOR COURT, Montreal, 30 June, 1863.

Before MONK, Justice.

POIRIER *vs.* TASSÉ *et al.*

Jugé : 1° Qu'une action en résiliation de vente peut être portée par le vendeur d'un immeuble non payé, contre son acquéreur, en aucun temps avant l'expiration de trente ans de la date de l'acte, dans le cas où il resterait une balance du prix de vente encore due; et que le jugement sera déclaré commun à un co-Défendeur (acheteur de l'acquéreur) qui sera condamné à remettre la propriété si il n'aime mieux payer la balance du prix, avec intérêts et dépens.

2° Que les fruits et revenus de la propriété à compter de la date de la vente seront déclarés avoir été compensés, et seront compensés, par aucune somme payée au Demandeur, ou sur son compte, par l'acquéreur immédiat. (1)

The action was brought on the 20th March, 1863, against Vincent Tassé, absent from the province, and Jérémie Gratton, to resiliate a deed of sale from Plaintiff and his wife, to Tassé, of the 10th of April, 1833, for non payment of a balance of the purchase money. The declaration set up the notarial deed of sale to Tassé, above referred to, of an emplacement in the village of St. Martin, for 1850 *livres ancien cours*, of which 450 were paid in cash; the balance to be paid to one Giroux, Plaintiff's vendor, by payments of 100 livres yearly, the first of which was to be paid on the 1st May, 1833; a transfer of the 1st March, 1855, from Giroux to one Nadon,

(1) V. art. 1536, 1537, 1538, 1539 et 1540 C. C.

of 480 livres, balance of the *prix de vente* due to the *cédant* under his deed to Plaintiff, of the 26th April, 1830; a transfer of this sum by Nadon, with interest, 516 livres, to one Lavoie, on the 19th March, 1862, payment by Plaintiff to Lavoie of this sum and interest, in all $166, as per notarial receipt filed, bearing date also on the 31 March, 1862. Then followed allegations of the neglect of Tassé to pay; that Plaintiff had a right to have the deed to Tassé resiliated, and to recover as the rents, issues and profits of the emplacement, from the 10th April, 1833, the sum of $360, deducting however $228.06, amount paid by Tassé, partly to Giroux and partly to Plaintiff, by the 450 livres acknowledged in the deed sought to be resiliated; leaving a balance of $131.94; that Defendant Gratton, acquired the emplacement by deed from Tassé of the 5th December, 1861; that the rents, issues and profits amounted in all to $600, which more than compensated any sums paid by Tassé. Conclusions: that the deed of the 10th April, 1833, be resiliated, and Plaintiff restored (réintégré) to the property and possession of the emplacement, as if the sale had never been made: that Defendant Tassé be condemned to reimburse and pay to Plaintiff $600 for the rents, issues and profits, and that the sums paid by Tassé be thereby declared to be more than compensated; that the judgment be declared *commun* to Gratton, and that he, Gratton, be condemned to deliver up possession of the emplacement within a delay to be fixed, unless he preferred to pay the balance of capital and interest referred to, and the $131.94, with costs. No plea was filed in the cause.

MONK, Justice: After stating the pleadings said, that this was certainly a hard case, to set aside a deed of sale almost thirty years after its date, but he felt himself bound, whatever might be his own opinion, by the judgment rendered in appeal which settled the principle contended for by Plaintiff. (1)

JUGEMENT: " La cour, après avoir entendu les parties, sur le mérite de cette cause, *ex parte*, les Défendeurs n'ayant pas plaidé à cette action, déclare résolu et résilié l'acte de vente du 10 avril 1833, passé devant P. J. Filiatrault et son confrère, notaires, et fait par le Demandeur et Elizabeth Labelle, son épouse, au Défendeur, Vincent Tassé, " d'un emplacement situé &c.," vu le refus et négligence par les Défendeurs de payer la balance, en capital et intérêts, du prix de vente du 10 avril 1833, c'est-à-dire, la somme de $170; ordonne que le Demandeur soit réintégré dans la propriété et possession du

(1) The learned Judge referred to the case of *Patenaude*, Appellant, and *Lérigé dit Laplante*, Respondent, reported suprà, p. 105.

dit emplacement et dépendances, de même que si la vente n'avait jamais eu lieu, et condamne le Défendeur, Vincent Tassé, à rembourser et payer au Demandeur la somme de $540, pour lui tenir lieu des fruits et revenus du dit emplacement depuis le dit jour, 10 avril 1833, à venir jusqu'au 16 mars 1863. Déclare les diverses sommes qui ont été payées par le Défendeur, Tassé, à compte du prix de vente du 10 avril 1833, plus que compensées par la somme de $540, représentant les fruits et revenus du dit immeuble perçus par les Défendeurs, successivement, depuis le dit jour, 10 avril 1833 ; déclare le présent jugement contre Vincent Tassé, commun au Défendeur, Jérémie Gratton, et condamne Jérémie Gratton, comme détenteur du dit emplacement, à le délaisser et à en abandonner la possession au Demandeur, sous quinze jours de la signification du présent jugement, si mieux n'aiment, toutefois, les Défendeurs, payer au Demandeur, dans le délai de quinze jours, la balance en capital et intérêt du prix de vente, savoir, la somme $166, avec intérêt sur celle de $80, à compter du 1er mars 1833, jusqu'au paiement, avec dépens. (13 *D. T. B. C.*, p. 459 et 7 *J.*, p. 226.)

BÉLANGER and DESNOYERS, for Plaintiff.

CUMUL D'ACTIONS.—ACTION PETITOIRE.

SUPERIOR COURT, Montreal, 31st March, 1863.

Before SMITH, Justice.

ROBERTSON *vs.* STUART.

Jugé: 1° Que, dans l'action intentée, il y avait cumul de trois actions différentes et incompatibles, 1° une action pétitoire, 2° une action ponr faire remplir une excavation 3° une action alléguant qu'un certain passage était trop haut; que ces actions, quoique résultant du même acte de vente par le Demandeur au Défendeur, ne pouvaient être jointes. (1)

2° Qu'une action pétitoire ne peut être portée par un propriétaire contre son voisin, se plaignant d'empiétation sur sa propriété; l'action en pareil cas étant l'action de bornage. (2)

The Plaintiff, in his declaration, set up a notarial deed of sale to him, from one Lynch, of a lot of land with a frontage on Craig street, in the city of Montreal, of 60 feet, more or less, the lot being bounded in rear by Fortification Lane; a sale from Plaintiff to Defendant, on the 1st February, 1858, of a portion of the same lot, and also set up a clause in the

(1) V. art. 15 C. P. C.

(2) V. art. 941 C. P. C.

latter deed to the effect, that: "The present sale is made under "the express condition, and it is hereby understood and agreed, "that Stuart shall leave a gateway or passage of at least 8 "feet 3 inches in breadth, by a depth of 55 feet from the line "of Fortification lane, adjoigning the property of Robertson, "which passage shall remain a common passage, *passage* "*commun*, for ever, between the parties, their heirs and "assigns. . Stuart, however, to have the right to build over the "said passage and use the wall of the building of Robertson, "as aforesaid, leaving nine clear feet in height for the pass-"age;" that, as Plaintiff had recently ascertained, Defendant had encroached upon Plaintiff's property to the extent of 8 inches with the wall of certain buildings erected by Defendant, without right, and had thereby prevented Plaintiff from using his adjoining lot to its full extent; that notwithstanding the clause above quoted, Defendant had made the passage too high, that Plaintiff, to avoid difficulty, had raised his yard 18 inches; that Defendant had excavated under the passage, converting the space under the passage into a cellar with a trap door, that the entrance to Plaintiff's yard was impeded by the steep ascent, and that Plaintiff's horse had fallen through the trap, and the gateway and passage was liable to rot and get out of repair; that, by notarial protest of the 3rd June, 1859, he had notified Defendant to fill up the excavation, and to restore the passage to the same state of usefulness as it was at the time of the sale, which Defendant had failed to do; that Plaintiff had been unable to get his horses and waggons into his yard, and had been put to great expense and damage amounting to £250, which he had a right to recover, as well as to have the *empiétation* by the wall removed and the excavation filled up, the trap door removed and the passage made solid, and so as to be conveniently used. Conclusion, that it be adjudged that Defendant had encroached with his wall, and that he be condemned to remove it, and, in default thereof, that Plaintiff be authorized to have it removed at Defendant's expense. Also that Defendant be condemned to fill up the excavation and remove the trap door, and lower the passage so that it might be conveniently used, and to pay £250 damages. By his first plea, Defendant alleged that Plaintiff had brought two actions, "*deux causes distinctes* "*et différentes, l'une qui a rapport au passage, étant une ac-*"*tion en démolition de nouvel œuvre, l'autre étant une ac-*"*tion au pétitoire.*" Conclusion that Plaintiff be condemned to choose, *opter*, within a delay, which of the two actions he would select, and that the other action not so chosen be dismissed with costs. A plea to the merits was also filed, upon which the parties went to proof, and the case was inscribed

by consent for hearing on the exception and on the merits of the cause.

SMITH, Justice: Stated that this was an action, first, *au pétitoire*, claiming a portion of ground alleged to have been encroached upon by Defendant; 2nd, an action to have an excavation made below a passage by Defendant, under a stipulation in the deed of sale to him from Plaintiff, filled up, on the ground that Defendant had no right to excavate; and 3rd, an action complaining that the passage was made too high, and that Plaintiff could not get access into his yard. It was clear that these three actions could not be brought together, although they all arose under one deed of sale from Plaintiff to Defendant. In addition to these the parties were contiguous proprietors, and such being the case, he held now as he had formerly held, that the only action that contiguous proprietors had in case of a complaint of *empiétation* or unjust possession of Plaintiff's land was *en bornage*. The action must be dismissed.

JUDGMENT: "Considérant que le Demandeur a, dans et par la présente poursuite, cumulé et joint trois causes d'action distinctes et différentes; considérant qu'en loi le Demandeur a été, et est mal fondé à joindre et unir ces trois causes d'action, dans et par une seule poursuite; considérant que le Demandeur a refusé de faire choix entre les trois causes d'action de celle qu'il entendait poursuivre à l'exclusion des deux autres, suivant l'offre qui lui en a été faite par le Défendeur, et que, partant, il est en défaut sous ce rapport; considérant que l'exception de cumulation en premier lieu proposée par le Défendeur est bien fondée en loi, et que les faits qui y sont mentionnés ont été prouvés; considérant, en outre, qu'il est prouvé qu'il n'y a jamais eu entre les héritages des parties mentionnés et décrits dans l'action et les défenses, une ligne de division tirée conformément à la loi; considérant que tels héritages à l'endroit où ils se touchent latéralement, n'ont jamais été bornés conformément à la loi, que, sous ce rapport encore, les exceptions du Défendeur sont bien fondées; considérant qu'en l'absence de bornage, il est impossible de savoir jusqu'à quel point s'étend l'héritage de chacune des parties, et que, partant, le Demandeur a été, et est mal fondé dans sa présente action qu'il a intentée au pétitoire; considérant, en outre, que le Demandeur n'a point prouvé la vérité des faits contenus en son action, tandis que le Défendeur a de son côté justifié de ses défenses, a débouté et déboute cette action, avec dépens. (13 *D. T. B. C.*, p. 462.)

ROBERTSON A. & W., for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

SAISIE-ARRET AVANT JUGEMENT.

COUR DE CIRCUIT, Québec, 24 octobre, 1863.

Présent : TASCHEREAU, juge.

GODIN *vs.* MCCONNELL.

Jugé : 1° Que, dans un affidavit pour saisie-arrêt avant jugement, l'omission des mots *perdra sa dette*, ne vicie pas l'affidavit, et ne donne pas au Défendeur le droit de demander l'annulation du writ. (1)

2° Que nulles raisons pour l'annulation d'un writ, outre celles énoncées en la motion, ne peuvent être prises en considération par la Cour.(2)

Une saisie-arrêt avant jugement émana, fondée sur l'affidavit du Demandeur que le Défendeur lui devait $200.00, et que le Defendeur était sur le point de cacher et de recéler ses biens, dettes et effets, dans la vue de frauder ses créanciers, et que, sans le bénéfice d'un bref de saisie-arrêt pour saisir-arrêter les biens, dettes et effets du Défendeur, le déposant souffrirait des dommages. Le Défendeur, par son procureur, obtint une règle *nisi* pour faire mettre de côté *(quash)* le bref de saisie-arrêt : " Because the affidavit on which the same issued is irregular " and insufficient, and because, among other reasons, the " words " will lose his debt," prescribed by the statute, are " not to be found therein, and have been omitted."

TASCHEREAU, Juge : La cause se présente sur une motion pour faire annuler le bref de saisie arrêt émané. Les raisons données par la motion, et sur laquelle elle est fondée, ne sont pas celles qui ont été données par le procureur du Défendeur à l'argument, mais c'est seulement d'après la motion et les raisons énoncées à son appui en icelle, que je puis rendre jugement. Vu que la question élevée par cette motion peut se présenter tous les jours, je me suis consulté avec mon confrère le juge Stuart, et nous sommes tous deux d'avis, que l'omission des mots " will lose his debt," ne rend pas nul l'affidavit, et n'est pas une raison suffisante pour faire mettre de côté la saisie-arrêt. Le Demandeur a le droit de procéder contre le Défendeur pour tout le montant de sa demande, et si le Défendeur recèle ou cache une partie seulement de ses biens, et qu'il ne lui en reste pas assez pour assurer au Demandeur le paiement de toute sa créance, le Demandeur a droit de prendre une saisie-arrêt. L'intention de la loi est de garantir le Demandeur de tout dommage ou perte qui pourrait lui arriver par suite de la fraude du Défendeur, et la raison donnée dans son affidavit " qu'il souffrira des dommages," lui donne le

(1) V. art. 834 C. P. C.

(2) V. art. 819 et 854 C. P. C.

droit d'arrêter les effets de son créancier par voie d'arrêt-simple.

JUGEMENT : La motion est renvoyée. (13 *D. T. B. C.*, p. 465.)

FORTIER, pour le Demandeur.

GUGY, pour le Défendeur.

SIGNIFICATION DE PROCEDURE.

SUPERIOR COURT, Montreal, 29th September, 1863.

Before BERTHELOT, J.

LACASSE *vs.* LACASSE *et al.*

Jugé : Que la clause dans le statut refondu du B. C., cap. 83, sec. 64, à l'effet que la signification de règles, avis, etc., peut être faite au bureau du protonotaire ou greffier de la Cour, ne s'applique pas au cas de Défendeurs absents, appelés par la Gazette, lorsqu'il n'y a pas de comparution produite pour tel Défendeur. (1)

In this case Defendants were called in by the Gazette, as having left their domicile in Lower-Canada, and having no domicile in the district of Montreal. A rule for *faits et articles* was served at the prothonotary's office, and default entered. Certain depositions were taken, and the case having been inscribed for hearing on the merits, it was contended for Plaintiff, that he was entitled to the benefit of the default, under the ruling in the cases of *Mayotte* vs. *Campbell*, and *Kinlock* vs. *Scott*. (2)

BERTHELOT, Justice : Held that the cases cited were not conclusive, there being in these cases an appearance for the par-

(1) Con. Stat. L. C., Cap. 83, Sect. 64 : " And if any order, rule, notice or proceeding emanating from the Superior or Circuit Court, or from any Judge, or incident to any suit or proceeding in either of the said Courts, requires to be served upon any party to any cause or instance, who has left Lower-Canada since the commencement of such cause or instance, or who is not domiciled in Lower-Canada, the service of any such order, rule, matter or proceeding, may be lawfully made upon such party at the office of the Prothonotary or of the Clerk of the Court, in which and at the place where such cause or instance is pending ; and the return of the bailiff stating that he has made diligent search and has not been able to find the party, and that to the best of his belief, such party is not within the limits of Lower-Canada, shall be *primâ facie* sufficient to establish the fact of such absence."

(2) No 2483. *Mayotte* vs. *Campbell*, Superior Court, Montreal, judgment 6 May, 1862 : Action for a part of a *prix de rente* against Peter Campbell, described as of Ottawa, in Upper Canada, and John Campbell, formely of Chambly, in the district of Montreal, and Andrew Campbell, of St. Mathias, in the district of Montreal. John Campbell was called in by advertisement, Andrew Campbell appeared by counsel, but no plea was filed on behalf of any of Defendants. Interrogatories were served on Defendants at the prothonotary's office. BERTHELOT, J. : " Considering that Defendants have neglected to ap- " pear to answer the interrogatories *sur faits et articles* duly served upon them " doth declare the *faits et articles* to be admitted and confessed ; and it is

ties, and the cases being otherwise distinguishable from this case. The benefit of the default could not therefore be obtained by Plaintiff. Judgment discharging *délibéré*. (13 *D. T. B. C.*, p. 467.)

BÉLANGER and DESNOYERS, for Plaintiff.

SAISIE-ARRET AVANT JUGEMENT.

CIRCUIT COURT, Quebec, 25th November, 1863.

Before TASCHEREAU, Justice.

BOUDROT *vs.* LOCKE *et al.*

Jugé: 1° Que dans un affidavit pour saisie arrêt avant jugement, le déposant doit adopter les mots du statut, et doit jurer qu'il est informé d'une manière croyable, a toute raison de croire, et croit vraiment en sa conscience, que le Défendeur recèle ses effets, et que sans l'avantage d'un writ de saisie-arrêt il perdra sa créance. (1)

2° Que l'appointement du Demandeur en pareil cas comme gardien des effets saisis, ne viciera pas la saisie. (2)

The action was commenced by *saisie-arrêt* which issued on the affidavit of Plaintiff; by the affidavit in question, Plaintiff alleged that Defendants were personally indebted to him in the sum of $200, and he concluded by saying: " Que le Dépo- " sant a toute raison de croire, et croit, que les dits Locke et " Kingdom, et George W. Plumer, sont sur le point de recéler " leurs biens, dettes et effets, dans l'intention de frauder le " déposant, et que, sans un bref de saisie-arrêt, le déposant " croit qu'il perdra sa dette, et souffrira des dommages." The

" considered that Plaintiff do recover from Defendants, jointly and several- " ly, the sum of £100, etc.

No 1989. *Kinlock* vs. *Scott*, and Scott, Opposant. Judgment, 30th June, 1863. S. C., Montreal: The Opposant, described in the opposition as of Kirkwall, Orkneys, in Scotland, claimed the real estate seized in the cause as her property, under a deed of sale of 14 Sept., 1860, from Ann Scott, and others, executed before notaries, at Montreal, and filed with her opposition. The opposition was contested on the ground that the deed of sale was fraudulent and collusive, and that the Opposant was not in Montreal at the time she purported to be present as a party to the deed. The only evidence produced by the Opposant was the copy of the alleged deed. The Plaintiff contesting caused interrogatories *sur faits et articles* to be served on the opposant at the prothonotary's office, upon which a default was entered. No other evidence was adduced in the cause. SMITH, J., dismissed the opposition. " Considering " that Opposant hath failed to prove the allegations of her opposition."

No 2284. Judgment, 30th October, 1863. In the Superior Court, Montreal, *Fenn* vs. *Bowker*, (BERTHELOT, J.,) granting motion to set aside rule for *faits et articles* served on Plaintiff, described as of Rochester, in the state of New-York, on the ground that interrogatories could not legally be served at the prothonotary's office.

(1) V. art. 834 C. P. C.

(2) V. art. 560 et 841 C. P. C. et art. 14 C. C.

Defendant moved that the writ of saisie-arrêt, and the attachment made in virtue thereof, be quashed and set aside, because the affidavit on which the writ issued was illegal, and insufficient in law, and because no legal or valid attachment was made in virtue of the writ, the bailiff who executed the same having, contrary to law, appointed Plaintiff guardian to the effects seized.

TASCHEREAU. juge : Par l'art. 13, du tit. 19, de l'ord. de 1667, ce n'est pas à peine de nullité que l'huissier exploitant une saisie, prend pour gardien des effets saisis quelqu'un qui ne peut être nommé, c'est seulement à peine de dommages et intérêts envers le saisissant, et cette raison donnée dans la motion des Défendeurs n'est pas en elle-même suffisante pour faire mettre de côté la saisie. Mais cette motion contient un allégué, en termes généraux, que l'affidavit sur lequel le bref de saisie-arrêt a émané, est insuffisant en loi. Le Demandeur ne suit pas la formule donnée au statut pour les affidavits de cette espèce. Il ne jure pas qu'il est informé d'une manière croyable, a toute raison de croire, et croit vraiment en sa conscience que les Défendeurs sont sur le point de recéler, &c., qu'il croit vraiment que, sans le bénéfice d'un mandat de saisie-arrêt,, il perdra sa dette, etc. Il jure seulement qu'il a toute raison de croire et qu'il le croit. Quelle raison a-t-il de croire ainsi ? Son affidavit n'en montre aucune et on peut croire qu'il n'en avait pas. Dans une procédure aussi sévère que celle de la saisie-arrêt avant jugement, je suis disposé à tenir le Demandeur aux termes de la loi, et à dire que la formule du statut est sacramentelle.

JUDGMENT : The motion is declared absolute, and the writ of *saisie-arrêt* quashed. (13 *D. T. B. C.*, p. 469.)

CARON, for Plaintiff.

HOLT and IRVINE, for Defendants.

CONTESTATION LIEE.—ARTICULATION DE FAITS.

SUPERIOR COURT, Québec, 5 décembre, 1863.

Present : TASCHEREAU, Justice.

BOSWELL *vs.* LLOYD.

Jugé : 1° Qu'il ne peut y avoir qu'une issue aux mérites entre les parties, Demandeur et Défendeur, ou Défendeurs qui n'ont pas séparé leur défense et qu'une seule articulation de faits.

2° Que l'issue est jointe aux mérites sur la production de tous les plaidoyers et de toutes les réponses, ou par l'expiration du délai pour leur production. (1)

(1) V. art. 148 et 207 C. P. C.

The Plaintiff brought suit against Defendant for the use and occupation of certain premises. The Defendant pleaded by *défense au fonds en fait*, and perpetual peremptory exception, setting up necessary repairs in compensation of Plaintiff's demand. The Plaintiff filed a general replication to the *défense au fonds en fait*, and a special and general answer to Defendant's exception, alleging that Defendant could not compensate the rent by the repairs, inasmuch as Plaintiff had notified him not to make repairs. With these answers Plaintiff filed an articulation of facts, to which Defendant answered under protest, and reserving his right to have the articulation struck. The Defendant then produced a general answer to Plaintiff's special answer to his plea, and with it, his articulation of facts; on the issue joined, Plaintiff produced a second articulation of facts. The Defendant subsequently moved to amend his plea which was granted him on payment of costs. In the taxed Bill of costs, the prothonotary allowed to Plaintiff two separate fees of $6.00, on his articulations of facts, and the question submitted to the court arose on Defendant's motion to revise this taxation. For Defendant, it was argued that Plaintiff was only entitled to one fee on the articulation of facts, for, although it was true that two articulations had been filed in the cause, only one had been filed in accordance with the provisions of the law which required that an articulation of facts should be filed by each party on any issue joined. That, by another clause of the statute (Con. Stat. L. C. Cap. 83, Sec. 72.) it was provided that the issue should be considered as joined by the declaration, plea and answer, or by the plea, answer and reply; that the pleadings in the cause had gone no further than the above, but that, if any further pleading had taken place, the issue would only have been completed when the last plea or answer allowed by the custom or practice of the Court had been put in, and not on each separate answer to each plea filed. That if, in any case in which but two parties were concerned, there could be two distinct issues on which the filing of separate articulations would be permitted, the present was decidedly not such a case.

CAMPBELL, for Plaintiff, maintained the correctness of the prothonotary's taxation, as there were two issues raised and perfected in the cause; one on the declaration, *défense en fait*, and general answer, on which issue Plaintiff would be obliged to prove the material allegations of his declaration, and another on Plaintiff's answer to Defendant's plea of compensation, on which different evidence would be required. The filing of two articulations had been allowed in a case similar to the present one, in which His Honor, Chief-Justice Bowen,

had allowed the filing of an articulation of facts on the issue joined on the *défense en fait*, and a second one on the special answer to the Defendant's exception. He further contended that the present motion to revise could not be granted, inasmuch as Defendant had filed answers to both articulations, and had not moved to have either struck from the record, that, by so doing, he had waived his right, and could not now raise the question on a motion such as the present.

TASCHEREAU, Justice: The prayer of this motion must be granted, as the filing of the first articulation of facts by Plaintiff was illegal, the issue between the parties not having been joined. The Plaintiff pretends that Defendant should have moved to have it struck from the record, and that, by omitting to do this, he has acquiesced in it. It is true that Defendant did not move this court to strike the articulation, but there is no fixed time during which such a motion can be made, it may be made at any time before the closing of the *enquête*, and although the Defendant produced an answer to the articulation of facts in question, he did so under protest, and reserving to himself the right at any future time to have the same struck from the record.

JUDGMENT: Considérant que l'articulation de faits filée par le Demandeur, le 10 septembre dernier, a été prématurément filée, savoir, avant que l'issue eût été complétée par la réplique du Défendeur, aux réponses spéciales du Demandeur, et que cette articulation ne pouvait se filer qu'après cette issue jointe, la cour considère comme nulle et non avenue la première articulation, et ordonne qu'elle n'entrera pas en taxe, Etc. (13 *D. T. B. C.*, p. 476.)

CAMPBELL and GIBSONE, for Plaintiff.

LLOYD, JAMES C., for Defendant.

APPEL.—DEPENS.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 2 septembre 1863.

Before: AYLWIN, DUVAL, MEREDITH, MONDELET, and BERTHELOT, Justices.

BOUVIER, Appellant, and REEVES, Respondent.

Jugé: Sur motion de l'Intimé, que la procédure sera suspendue jusqu'à ce que les frais d'un premier appel qui avait été abandonné soient payés, et, à défaut de paiement dans un délai prescrit, l'appel sera renvoyé. (1)

(1) V. art. 453 C. P. C.

Motion by Respondent for the dismissal of the appeal, on the ground that a judgment of the Court of the 9th of March, 1863, declared the appeal deserted and abandoned, and because the costs taxed on such appeal had not been paid.

JUDGMENT: "It is ordered that all proceedings be suspended until Appellant shall have paid to Respondent the costs, amounting to £12.7.6, mentioned in the motion, and that, in default of the costs being paid, on or before the 9th September instant, the present appeal be dismissed, with costs in favor of Respondent, and the record remitted below, and this without any farther judgment being necessary for the purposes aforesaid, with costs on the motion in favor of Respondent." (13 *D. T. B. C.*, p. 479, et 12 J., p. 291.)

SICOTTE and RAINVILLE, for Appellant.

PERKINS, for Respondent.

APPEL.—CAUTIONNEMENT.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 7 mars 1865.

Before: DUVAL, Chief-Justice, AYLWIN, MEREDITH, MONDELET, and BERTHELOT, Justices.

BOUVIER, Appellant, *and* REEVES, Respondent.

Jugé: 1° Que, dans le cas d'un writ d'appel, rapportable le 25 novembre, 1862, rapporté que le 24 février suivant, l'appel sera déclaré déserté et abandonné, avec dépens.

2° Qu'un second writ d'appel peut être émané, pourvu que ce soit dans le délai fixé par le statut. (1)

3° Que sur motion de l'Intimé il sera ordonné par la cour, qu'à défaut du paiement par l'Appelant, dans un court délai, des frais taxés sur le premier appel, le second appel sera renvoyé, avec dépens, et le record remis sans qu'il soit besoin d'aucun autre jugement, avec dépens de la motion.

4° Que la cour ordonnera qu'une règle pour reviser la taxation par le greffier des appels d'un mémoire de frais soit rayée du rôle, et le mémoire soumis à l'un des juges de la cour.

Il semble: Qu'une exception prise à la suffisance d'un cautionnement en appel, fondée sur ce que l'une des cautions résidait dans un district différent dans le Bas-Canada de celui dans lequel le jugement avait été rendu, ne sera pas maintenue.

The writ of appeal was returnable on the 25th November, 1862, and was returned on the 24th February, 1863. On the 2nd March, 1863, Respondent moved for the dismissal of the appeal as being returned too late, one term of the court having intervened.

JUDGMENT, 9th March, 1863: "Considérant que l'Appelant n'a pas rapporté devant cette cour le writ d'appel émané, ou

(1) V. art. 1118 et 1121, C. P. C.

le dossier et les procédés de la cour de première instance dans les délais requis, déclare le dit appel déserté et abandonné, avec dépens." The reason of the return of the writ not having been made was stated to be the nonpayment of fees of the prothonotary of the Superior Court. In the same case, a motion was made before the court, the 1st June, 1863 to revise the taxation of the bill of costs by the clerk of appeals. Judgment was rendered the 2nd June, 1863, ordering the case to be struck from the roll, and to be submitted to one of the judges of the court. A second writ of appeal was sued out, and Respondent moved to set aside this second or *alias* writ, because: 1° The former appeal had been by the judgment declared deserted and abandoned, with costs, and the costs had not been paid. 2° Because no second or *alias* writ could legally issue. 3° Because the security was insufficient, one of the bail being resident in a district (Iberville) other than that wherein the judgment was rendered (Montreal). June 5th, motion dismissed. September 2nd: " Ordered, on motion of Respondent, that all " proceedings be suspended till Appellant shall have paid " Respondent £12 7 6, costs taxed on the previous appeal, and " in default of payment before the 9th September, instant, " that the present appeal be dismissed, with costs in favor of " the Respondent, the record in the cause remitted to the court " below, and this without any further judgment being necessary for the purpose aforesaid, with costs on said motion in " favor of the Respondent." On the 7th March, 1865, judgment was rendered on the merite of the appeal, the judgment below being confirmed, with costs. (15 *D. T, B. C.*, p. 465.)

SICOTTE et RAINVILLE, pour l'Appelant.

PERKINS, Jr., pour l'Intimé.

CAUTIONNEMENT EN APPEL.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 2 septembre 1863.

Before: Sir L. H. LAFONTAINE, Bart., Chief-Justice, DUVAL, MEREDITH and MONDELET, Justices.

BERRIAU, Appellant, and MCCORKILL, Respondent.

Jugé: Que la Cour, pour cause, prolongera le délai pour donner caution sur un appel de la Cour de Circuit. (1)

In this cause, security was given in the Circuit Court for the county of Missisquoi, on the 12th of February, 1863; the record was returned into the Court of Appeals on the 9th of

(1) V. art. 1121 C. P. C.

March, and, on the 3d of June, Respondent moved that the bailbond be set aside on the ground of the insufficiency of the security. The hearing of this motion was postponed till the 1st September, when a motion was made by Appellant, founded on affidavits, to be allowed to put in new security. Judgment allowing ten days from the date of the judgment to give new security. (13 *D. T. B. C.*, p. 480.)

LEBLANC and CASSIDY, for Appellant.

ROBERTSON, A. and W., for Respondent.

OBLIGTAION DE LA FEMME POUR LE MARI.

BANC DE LA REINE, EN APPEL, Montréal, 1 mars, 1864.

Présents: DUVAL, MEREDITH, MONDELET et BADGLEY, Juges.

BÉRIAU, Appelant, *et* MCCORKILL, Intimé.

Jugé: Que, dans l'espèce, le mari, légataire universel de sa femme, pour laquelle il avait endossé un billet promissoire, était tenu au paiement du montant du billet, nonobstant le défaut de protêt, la Cour considérant qu'il était suffisamment prouvé qu'il avait consenti à l'omission du protêt au nom de sa femme, pour éviter des frais, et que, de fait, la femme n'était qu'un prête-nom pour couvrir le commerce du mari.

Le 14 février, 1857, à Farnham, dans le district de Bedford, Esther Vincelette fit et souscrivit un billet par lequel, à deux mois de cette date là, elle promit payer au bureau de la Banque du Peuple, à Montréal, à l'ordre de Marie-Anne Poitras, épouse de Joseph Bériau, marchande publique, et séparée de biens d'avec son mari, une somme de £33.13.4. Marie-Anne Poitras étant devenue propriétaire de ce billet l'endossa en faveur de l'intimé. Cet endossement fut fait par Bériau, pour son épouse. Ce billet étant devenu dû et exigible le 15 avril, 1857, ne fut point protesté pour conserver l'endossement de Marie-Anne Poitras. Le 13 août, 1859, l'Intimé intenta son action devant la Cour de Circuit pour le Comté de Missisquoi, contre Esther Vincelette, et contre l'endosseur, Marie-Anne Poitras. Par cette action, l'Intimé alléguait l'existence du billet qui était devenu sa propriété par l'endossement de Marie-Anne Poitras. Il fut admis que ce billet n'avait pas été protesté à son échéance dans les délais prescrits par la loi pour conserver la responsabilité de l'endosseur, mais il était allégué que c'était à la demande de cette dernière que ce billet n'avait pas été protesté, et qu'elle avait promis lui en payer le montant, s'il consentait de ne le point faire protester, tout aussi bien que s'il en faisait faire le protêt, et que ce fût à raison de cette promesse que le billet ne fût point protesté, puis il concluait à

une condamnation solidaire contre le faiseur et l'endosseur de ce billet. Après le rapport de cette action devant la cour, Marie-Anne Poitras est décédée. Son époux Joseph Bériau, qu'elle avait institué légataire en usufruit de ses biens, et son exécuteur testamentaire, intervenant dans la cause, y reprit l'instance, et pour défense à l'action prétendit que feu son épouse, Marie-Anne Poitras, avait été libérée de son endossement de ce billet, vu le défaut de protêt, et d'avis de protêt, et il nia qu'elle eût jamais renoncé à ses droits sous ce rapport, et qu'elle eût fait aucune convention par laquelle elle fût devenue obligée au paiement de ce billet. L'Intimé fit entendre deux témoins pour établir le fait que Marie-Anne Poitras avait dispensé l'Intimé de la nécessité de faire protester le billet en question, mais il faillit dans cette preuve. Néanmoins, la Cour de Circuit pour le district de Bedford, par son jugement du 28 janvier, 1863, condamna l'Appelant, comme représentant Marie-Anne Poitras, à payer à l'Intimé le montant de ce billet, avec intérêt et dépens. L'Appelant demandait l'infirmation de ce jugement pour les raisons suivantes : 1° Parce que ce billet n'a pas été protesté dans les délais prescrits par la loi, et que Marie-Anne Poitras que représente l'Appelant, est devenue en conséquence libérée de son engagement comme endosseur de ce billet : 2° Parce qu'il n'a pas été prouvé que Marie-Anne Poitras ait dispensé l'Intimé de la nécessité de faire protester ce billet à son échéance, en lui promettant d'en payer le montant ; 3° Parce que Joseph Bériau n'a jamais été autorisé par son épouse à dispenser l'Intimé de la nécessité de faire protester ce billet ; 4° parce que la preuve produite, n'a pas même établi le fait que Bériau eût dispensé l'Intimé de faire protester ce billet.

MONDELET, juge *dissentiente* : Le Demandeur allègue lui-même que le billet pour le recouvrement duquel il intenta son action, n'a pas été protesté contre l'endosseur Marie-Anne Poitras. Il allègue, de plus, que cette dernière, par son agent, Joseph Bériau, l'a exempté de ce protêt, et a promis de payer le montant du billet. Je suis d'avis que ni par la preuve testimoniale ni par les faits et articles, il est prouvé : 1° Que l'exemption de protester a eu lieu ; 2° que le Défendeur, époux de Marie-Anne Poitras, depuis décédée, eût aucune autorité d'exempter du protêt ; 3° que le Défendeur ait exempté le Demandeur de la nécessité du protêt ; 4° que, quand bien même il y aurait quelque preuve testimoniale (ce qui n'est pas le cas) elle serait inadmissible. Le jugement dont est appel, qui est rendu contre le Défendeur, comme légataire universel usufruitier et exécuteur testamentaire de feu son épouse, Marie-Anne Poitras, décédée, et dont il a repris l'instance, devrait être infirmé.

DUVAL, juge: Il n'y a pas de doute que le Défendeur a dispensé l'Intimé de la nécessité de faire protester le billet. Mais la question s'élève de savoir s'il pouvait légalement se désister du droit au protêt pour sa femme. Je pense qu'il le pouvait, d'autant plus que la preuve fait voir que, quoique le négoce des Appelants fût conduit sous le nom de la femme, c'est le mari qui faisait tout. Examiné sur faits et articles, le Défendeur, cependant, se contente de répondre à un certain nombre d'interrogatoires," je ne me rappelle pas." C'est une manière de répondre que les tribunaux ne peuvent pas approuver. Le jugement de la Cour Inférieure doit être confirmé, avec dépens. (14 *D. T. B. C.*, p. 400.)

Le jugement de la Cour de Circuit est confirmé.

LEBLANC et CASSIDY, pour l'Appelant.

ROBERTSON, A. et W., pour l'Intimé.

ARBITRAGE.—EXPERTISE.

QUEEN'S BRNCH, APPEAL SIDE, Montreal, 1 mars, 1864.

Before: DUVAL, MEREDITH, MONDELET and BADGLEY, Justices.

DUNN, Appellant, *and* BISSONNETTE, Respondent.

Jugé: 1° Que lorsque, dans une action par un menuisier pour ouvrages faits, le Défendeur a plaidé que les ouvrages avaient été faits en vertu d'un contrat verbal et pour un prix fixe, la cour ne devra pas renvoyer la cause à des experts ou arbitres pour décider quant à l'existence ou non existence du contrat.

2° Que. sans consentement des parties, la Cour Supérieure ne peut référer une cause à des arbitres, amiables compositeurs.

3° Qu'un jugement homologuant une sentence d'arbitres nommés sans tel consentement, et condamnant le Défendeur à payer le montant mentionné dans la sentence, sera infirmé avec dépens.

DUVAL, Justice: This was an action brought by Respondent, who is a carpenter, against Appellant, for work and labor done in repairing Defendant's house and barns, and for removing certain buildings, the action being in fact for eleven and a half months wages at so much per day, and for a small sum paid to workmen. The Defendant pleaded that the work was done under a verbal contract, that Plaintiff had not finished the work, but had abandoned it, and had moreover been paid what work he had done for Defendant. After a great deal of evidence had been gone into, the court, after the hearing on the merits, ordered the cause to be sent, not to *experts*, but to arbitrators, *amiables compositeurs*, who accordingly proceeded and made a report which was homologated by the court, and Defendant condemned to pay the sum awarded. The court had no autho-

rity to send the case to arbitration without the consent of parties. It was argued on behalf of Respondent, that this court must take it for granted that such consent had been given, otherwise the court below could not have sent the case to arbitration. But the record shows no such consent. On the contrary, Defendant moved to set aside the report on the express ground that no such consent was given, and also upon another ground, that as there was a question of contract or no contract raised by the pleadings, this question could not be left to arbitrators but was to be decided by the court This last ground was a good reason for not sending the case to arbitrators or *experts*, without a decision having been first rendered. The judgment appealed from must therefore be reversed; after careful consideration of the voluminous evidence of record, the court does not see that Plaintiff has proved that any specific amount of work had been done, or any amount beyond the payments made; the action must, therefore, be dismissed.

JUDGMENT: "Considering that there does not appear in the record and proceedings any consent of the parties, for a reference of the cause to arbitrators and *amiables compositeurs*, and that by law such reference could not have been ordered *mero motu* of the Court below: Considering that the cause was inscribed for hearing upon the merits after the *enquête* of the parties had been duly had and perfected, and that the reference to arbitrators and *amiables compositeurs*, was so ordered by the Court below, after the hearing of the parties upon the merits of the cause: Considering that the proceedings upon the order of reference, and the award and report thereon, were not founded in law, and that, in the interlocutory judgment of the 26th day of April, 1862, pronounced by the Court below, ordering such reference, and in the final judgment pronounced by the said Court on the first day of December, 1862, thereon, there was error, and that, upon the merits of the cause, there was no evidence sufficient to sustain the action of said Respondent against Appellant, the Court doth reverse and set aside the interlocutory judgment of the said 26th day of April, 1862, and also of the first day of December, 1862, and proceeding to render the judgment which the Court below ought to have rendered; doth dismiss the action of Respondent, with costs to Appellant, &c." (14 *D. T. B. C.*, p. 403.)

ROBERTSON, A. and W., for Appellant.

LANCTOT, for Respondent.

CHEMIN DE FER.—NEGLIGENCE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 9th March, 1864.

Before: DUVAL, C.-J., MEREDITH, MONDELET and BADGLEY, J.

THE CHAMPLAIN and ST-LAWRENCE RAILWAY COMPANY, Appellant, *and* SIMARD, Respondent.

Jugé: Que, dans l'espèce, les Appelants ne pouvaient être responsables de la perte de chevaux tués sur leur chemin, en l'absence de preuve de négligence de leur part, soit dans la conduite des trains, ou dans l'entretien des clôtures; la compagnie n'étant pas d'ailleurs obligée de faire telles clôtures à l'épreuve de chevaux, qui ne sont pas compris sous la désignation de *Bestiaux.*

This was an appeal from a final judgment rendered in the Circuit Court for the district of Montreal, on the 24th November, 1862, condemning Appellant, (Defendant in the Court below) to pay to Respondent (Plaintiff in the Court below) the sum of £37.10s., as damages; in the words of the judgment "*pour les causes et raisons mentionnées dans la déclaration* "*en cette cause.*" The chief question involved in the appeal, was, as to the liability of a Railway Company towards parties who set up claims for losses, or pretended losses, incurred through the fault and negligence of the parties themselves. The Plaintiff, by her action, in the Court below, sought to recover from Defendant, the sum of $150, as damages which she, Respondent, pretended she had suffered by the loss of two horses, killed, as she alleged, on Appellant's railroad. In Respondent's declaration, there was no allegation to the effect that the horses in question were killed by any of the trains, locomotives, or cars of Appellant, or by any of the servants or *employés* of the Company, or through their carelessness or negligence. The Respondent merely alleged that, owing to the bad condition and insufficiency of the fences along the line of railroad, the horses got off her property on the night of the 10th of September, 1861, and went upon the railroad, and were then and there killed, ("*ont là et alors été tués.*") There was no allegation as to how, or by whom the horses were killed, and it was not alleged, or shewn, by Respondent, that Appellant was bound to maintain the fences in question, or liable for not doing so. To this action Appellant, (under protest that no liability could attach to Defendant by reason of anything set forth in Plaintiff's declaration), pleaded that Defendant was not in any manner liable, or indebted toward Plaintiff, who had no right of action whatever; that there were good and sufficient fences on both sides of Defendant's railroad, constantly maintained and kept in good order, and such as by law required; that it was impossible for

horses, or other cattle, to have passed over or through these fences, unless they were purposely broken, taken down, or opened; that, if any horses belonging to Plaintiff were killed, as pretended by her, (which, however, Defendant did not admit) it was owing entirely to the culpable neglect and fault of Plaintiff in allowing them to stray and wander about at large, and in not taking proper care to prevent them from going upon the railroad, where they were trespassing against the will of Defendant, who used every proper precaution to keep them off the road. The Appellant, *d'abondant*, pleaded that Defendant had never been put *en demeure* by Plaintiff, with regard to the fences being out of order, or insufficient; nor had Defendant ever been notified or called upon by Plaintiff to repair them; and that no complaint regarding them was ever made by the Plaintiff, up to the time of the alleged accident. That, by reason of the premises, no fault or blame could attach or be imputed to Defendant for, or by reason of the pretended killing of the horses. The judgment rendered is in the following terms: " La Cour condamne la Défenderesse " à payer à la Demanderesse la somme de £37, 10, de dom- " mages, pour les causes et raisons mentionnées dans la décla- " ration; avec intérêt sur la dite somme à compter de ce jour, " jusqu'à l'actuel paiement, et aux dépens, &c."

BADGLEY, Justice: The Plaintiff's declaration alleges that, on the 10th September, 1861, Defendant's railroad then and long before traversed Plaintiff's property in the parish of Blairfindie, *une propriété appartenant à la Demanderesse;* that, on the said 10th September, and before and since, Defendant's fences were in bad order, &c.; that, by reason of their bad state and insufficiency, two horses belonging to Plaintiff, worth $150, which were pasturing on said property adjoining to the railroad, left the property during the night of the 10-11 September, and got upon Defendant's railroad opposite to Plaintiff's land, and were then and there killed, to Plaintiff's damage of $150, by the fault and neglect of Defendants. The Defendants filed an exception and a *défense au fonds en fait.* By the exception they allege the sufficiency of their fences; that horses and cattle could not have passed through them unless purposely broken; that the loss happened by Plaintiff's negligence in allowing her animals to stray on Defendants' track without their permission; that Plaintiff should have notified Defendant of the defectiveness of the fences, if they were not sufficient, and that no blame in the matter attached to Defendant. The Plaintiff's evidence, besides the proof of her property in the horses, of their value and of a *description sommaire* of a piece of land, her alleged property traversed by the rail-road, has reference solely to

to the state of Defendants' fences, generally, and all the five witnesses produced by her, two of them, her son in-law and farm servant, to the particuliar place or *pagée de clôture* where the horses got out. The Defendants' fences are described as being eighteen inches high by one witness, as thirty by another, as such that they could easily be *enjambée*, by a third, and finally as so bad by all of them, that the wonder is, any animals whatever on any of the adjoining properties could be induced to forego their natural straying propensities. The *pagée* in question is described as having one picket more than half unsound, and as to Plaintiff's horses, that they were quiet and docile, not accustomed to stray, not *malins aux clôtures*, as the serving man says, and would not even try to break a good fence as says the son-in-law. This testimony, in substance, is a declaration of the bad order of Defendants' fences generally, and of the particular outlet *pagée* in particular, which the horses selected, as it would appear from having one unsound picket. There is no proof of Plaintiff's title to the property said to be hers, no proof of Defendants' negligence in running their trains, none that a train did run that night, and none that the animals were killed by a train at all. The only proof is that the horses were in the pasture adjoining the railroad in the evening, and that next morning they were found dead on or near Defendants' road, having broken through the *pagée*. This evidence of itself is insufficient to maintain the action. The 39th section of Defendants' act of incorporation, 2 Will. IV, ch. 58, provides that the company shall within six calendar months after any lands shall be taken for the use of the railroad, divide and separate the land so taken from the lands adjoining thereto, &c. Now there is the omission in Plaintiff's proof as to how long before the accident, the land had been taken by Defendants, but that was met by the fact that they had erected the fence there and the presumption would be that the fences was erected in time. It is proved that the *pagée*, and one of its pickets with its oaken connecting peg, were broken from the violence employed, the upper bar having been used as a fulcrum and thrown back to separate the two pickets, the near end of the bar being near the foot of the picket, and the far end seven feet within Plaintiff's property. It is also in evidence that the hay growing on Defendants' railroad was a great temptation to Plaintiff's animals to stray, and that L'Heureux, her son-in-law, one of the witnesses, allowed them to stray on Defendants' road, which would of course save his own forage. The evidence of Defendants, is precise and satisfactory as to the sufficiency of their fences and of the *pagée* in particular, moreover the 39th section of the act of incorporation above referred to required Defendants

to make a sufficient fence for protection against *hogs, sheep and cattle,* and they were bound to do no more. Having done this, they fulfilled the requirements of the statute charter and could not be compelled to make a special construction for protection against vicious horses or even against horses at all; nor under those statutory requirements should Defendants be compelled to pay for the loss, not only of hogs, sheep or cattle, but of horses which she or her *employés* had taught to stray from her own alleged property upon that of Defendants. Moreover, by statute, horses are not cattle. (1)

MONDELET, Juge: Je ne comprends pas comment, en regard d'une déclaration vague, comme l'est celle de la Demanderesse l'on a pu accorder des dommages à l'Intimée, Demanderesse qui n'a pas pris la peine d'alléguer par qui et comment ses, chevaux ont été tués. Il est, en même temps, fort singulier que la Défenderesse n'ait pas fait débouter ou amender cette déclaration sur une défense en droit. Quoi qu'il en soit, "pour les causes mentionnées en la déclaration:" telle est la base du jugement. Quelles causes? Ces chevaux auraient pu s'introduire sur le chemin de fer, sans pour cela avoir été tués par les chars, bien qu'après avoir été tués, ils auraient pu être traînés et mutilés par les chars: D'ailleurs, les allégations ne justifient pas la preuve, que ces chevaux ont été tués par les chars, cette preuve était inadmissible. Mais, au mérite, il n'y a aucune preuve que les chevaux de la Demanderesse ont été tués par les chars. Quant aux clôtures, sept témoins ont, la veille, vu les clôtures de la compagnie. C'était leur affaire de les visiter et de les tenir en ordre. Tous les sept prouvent positivement qu'elles étaient en bon ordre, et que les pagées qu'ils ont vues, le lendemain matin de l'accident, n'ont pu être brisées qu'au moyen de beaucoup de violence et exprès. Ils prouvent aussi que les chevaux de la Demanderesse ont été souvent vus sur le chemin de fer; ils s'y rendaient par suite du mauvais état des clôtures de la Demanderesse. Il appert aussi qu'un des chevaux de la Demanderesse était un cheval vicieux qui défaisait les clôtures, et que ces clôtures ont été défaites par violence. D'après ces raisons et d'autres faciles à suppléer, je pense que le jugement de la Cour de première instance est mal fondé. Quant à la circonstance que les témoins de la Défenderesse ont été réunis à leur bureau, afin qu'on sût ce qu'ils connaissaient de l'affaire, il n'y a à cela rien de mal. C'était un acte de prudence qu'on ne peut blâmer, à moins qu'on ne prétende qu'on doit s'engager dans un procès, sans, au préalable, mesurer ses forces. Je pense, au reste, que la Demanderesse qui se sert de ses parents et, entr'autres, de son

(1) Agricultural act. con. stat. Lower Canada, ch. 26, secs. 5-8.

gendre, comme témoins, n'a pas bonne grâce à se plaindre de la compagnie qui fait entendre sept *section men*, les plus compétents, d'après leur connaissance personnelle, à prouver l'état des clôtures. Le jugement de la Cour de première instance doit donc être infirmé, et l'action de la Demanderesse déboutée, avec dépens dans les deux Cours.

" La Cour, considérant qu'il n'est aucunement établi en cette cause, que les chevaux de l'Intimée ont été tués par la faute ou négligence de l'Appelante, Défenderesse en Cour de première instance : Considérant qu'il y a erreur dans le jugement dont est appel, rendu par la Cour Inférieure, siégeant à Montréal, le 24 novembre, 1862, la Cour le casse, annule et met au néant. Et, cette Cour procédant à rendre le jugement que la Cour de première instance eût dû rendre, déboute Désange Simard de son action, et la condamne à payer tous les dépens, tant dans la Cour de première instance que dans cette Cour. (14 *D. T. B. C.*, p. 406.)

MACRAE, pour l'Appelante.

CARTIER, POMINVILLE et BÉTOURNAY, pour l'Intimée.

VENTE.—FRAUDE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1st March, 1864.

Before : DUVAL, MEREDITH, MONDELET and BADGLEY, Justices.

MCGRATH, Appellant, *and* O'CONNOR, Respondent.

Jugé : Qu'une vente d'immeuble faite par le fils à son père, sera déclarée simulée et frauduleuse, et sera mise au néant, à la demande de créanciers, nonobstant la preuve de numération du prix, s'il y a preuve suffisante du défaut de moyens pécuniaires du père.

BERTHELOT, Justice : This is an appeal from a judgment of the Superior Court, at Montreal, rendered on the 30th day of September, 1861, between Appellant, Plaintiff and Respondent, opposant in the said Court, dismissing Plaintiff's contestation of Opposant's opposition *à fin de distraire.* John O'Connor, Defendant in the court below, and the son of Opposant, on the 9th November, 1859, purchased, on credit, a vacant lot in Montreal, and undertook to build a house thereon. For this purpose, he obtained the necessary timber materials from Appellant, and George C. Boynton and Ostell, on credit. The carpenter work, the plastering, &c, were done *on credit :* the house was completed only in the beginning of May, 1860, and the labor necessary to build the same remained wholly unpaid for, as well as the larger portion of the materials. In April, 1860, Appellant and Defendant's other creditors pressing him

for payment. he, on the twentieth of April, 1860, made over the house and lot to his father, Opposant, nominally for £100, cash paid, &c., but, as he afterwards stated to witness O'Brien, "in order to save the property from being seized by his creditors." The house and lot were all the property that Defendant had, and his father was an old and poor man who had no need of such property, nor any apparent means of paying for it. The Appellant, hearing of the transaction, on the twelfth of May, 1860, instituted his action against Defendant, and recovered judgment by default, and, Defendant still living in and holding possession of the house, he, Plaintiff, seized the same on execution, to which seizure Respondent filed his opposition. The Appellant contested the opposition upon the ground of *fraud and collusion* between Defendant and Respondent son and father. He alleged, that the sale by Defendant to Respondent was of all Defendant's property, and meant by the parties to it as a fraud against Appellant and Defendant's other creditors; that Opposant had no means of paying for the property; that the sale was simulated; that Defendant was insolvent at and before the alleged sale; the legal conclusions from these premises for annulling the sale and dismissing the opposition were taken. The opposant answered generally, and the court, rendered the following judgment: "La cour, considérant que le Demandeur n'a pas suffisamment et légalement prouvé qu'il avait un titre de créance contre le Défendeur au temps de la passation de l'acte de vente du vingt avril, 1860, reçu devant Isaacson et confrère, notaires, par lequel le Défendeur a vendu à l'Opposant l'immeuble saisi: considérant, de plus, que cet acte de vente n'est pas un acte à titre gratuit, mais bien un acte à titre onéreux, ainsi qu'il y en a la preuve, et qu'il n'y a aucune preuve que l'Opposant ait été complice de la fraude que le Demandeur prétend avoir été commise vis-à-vis de lui par le Défendeur, en vendant et aliénant le dit immeuble, au préjudice de ses créanciers, a renvoyé la contestation de l'opposition, et adjuge et ordonne qu'il soit accordé main levée à l'Opposant de la saisie de l'immeuble saisi sur le Défendeur." C'est de ce jugement qu'il fut interjeté appel.

DUVAL, Justice: The question is whether the sale was genuine, or whether it was a sale to defraud the creditors of their rights. The Court is of opinion that it was a fictitious sale, and that there was no idea of transferring the property from the hands of the son to the father. The property was put into the hands of the father to save it. as the son stated to one of the witnesses, from being seized by his creditors, he being at the time insolvent. The sale being fictitious, the opposition of he father should have been dismissed. The judgment of the Court below must, therefore, be reversed.

MONDELET, Justice: I have never, in the course of a long practice at the Bar, and many years on the Bench, been more satisfied, than that, in the present cause, a daring fraud has been practised. In January, February and April, 1860, Defendant was indebted to Plaintiff who was his creditor. He then had a house, and, all at once, he sells it to his father, Opposant, a poor old man, without means, who afterwards continues to live with Defendant in the same house. He knew his son's position, he heard his son, Defendant, boasting of his object in selling the house, viz: to protect the property from the creditors, he, of course, assented to that. The Defendant is, unquestionably, in bad faith; opposant, in my opinion, is also in bad faith. Supposing, for the sake of argument, that Opposant was in good faith, for instance that he were a stranger, not knowing anything of Defendant's affairs, it would not follow that Defendant could then divest himself of his property and laugh at his creditors. Such a principle, immoral in itself and against law, consequently, would be destructive of all honesty and security in human affairs, and would destroy that confidence which is the soul of transactions between man and man. In the old Court of Queen's Bench, and in the Inferior Term, and in many cases since I have been on the bench, such transactions have been frowned upon, and deservedly. I think the judgment appealed from should be reversed. It incorrectly assumes, 1° that Plaintiff had no sufficient claim against Defendant. 2° That Opposant was in good faith. The first motive is unfounded in fact. The second is unfounded in fact and in law.

BADGLEY, Justice, giving the judgment of the Court: The Defendant bought a lot on credit and erected thereon a brick house, the materials for which were obtained on credit. On the 20th April, 1860, being then pressed by the *fournisseurs de matériaux*, and by Plaintiff in particular, he sells the property to his father for £280, whereof £150 for the land, £30 for ground *rente* due, and £100 cash. The latter was said to have been counted out in bills, $5 and $10, in presence of Defendant's brother, Timothy O'Connor, and of his brother in law, Drew. The father, the purchaser of the property, had been brought out to this country in 1857, at his son's expense; in 1858, he was a common laborer in the city, and could not pay, except by his labour, for a trifle of groceries which he required, since then, he went about the city with a basket either as a beggar or a labouring man. It is manifest that the father, opposant, had not the means to pay £100 in cash, and it is in evidence that Defendant had, before and since the sale, endeavoured to raise money on the property. But, beside all this, in a conversation with O'Brien, the painter, in the presence and

hearing of Opposant, apparently without objection on his part, Defendant said that "his creditors were coming on him before he was prepared to pay them, and he was under the necessity of making over the property to Opposant, to obtain delay so as to procure money to pay them." He also told O'Brien, in Opposant's hearing when speaking of Plaintiff's demand for materials furnished, that "if Plaintiff would give him a discharge for three cents, he would see him d....d before he'd give it." "La simple participation des personnes avec lesquelles le débiteur pratique ces traités suspects à des actes dont elles ont pu ignorer le but secret, ne les constitue en fraude qu'autant qu'il est établi que le mauvais dessein du débiteur leur était connu. (1) "C'est donc cette connaissance qui doit être prouvée, et, pour qu'elle soit utile à tous les créanciers, il suffit qu'elle ait eu lieu, à l'égard d'un seul: ainsi, le tiers qui a traité avec le débiteur, sachant que celui-ci ne pactisait avec lui que pour tromper un créancier, fût-il dans l'ignorance que ce débiteur avait d'autres créanciers, pourra être évincé pour chacun de ces derniers; la mauvaise action qu'il a commise le fait sortir du rang des tiers de bonne foi, que la loi protège; et tous ceux dont elle blesse les intérêts, ont action contre lui." (2) The Opposant was proved to be without means, no attempt is made to show where the £100 came from; Defendant continues to reside upon the premises sold and Opposant knew the fraudulent object of the sale. There is no doubt that it was a simulated sale and not an honest transaction. The Defendant's deposition goes for nothing, not having been accepted by Plaintiff under the Statute. But, apart from this, the evidence is abundant to show that Plaintiff was a creditor at the date of the deed, and that Opposant was an accomplice in the fraudulent manufacture of the deed. The grounds set out in the judgment of the Superior Court appealed from repose upon Opposant's good faith to some extent, but, as they are not sustained by the evidence, the judgment does not appear to be well founded.

"The Court, considering that, at the date of the deed of sale in contestation, made and executed between Defendant and Opposant, his father, to wit; on the 20th day of April, 1860, Defendant was largely indebted to divers creditors for materials furnished, and work and labour had and given in and about the construction of the house, in the deed of sale mentioned, and that Patrick O'Connor, the Opposant, was in necessitous circumstances and totally without the means of making the purchase or of paying the price therefor, as in the

(1) Chardon, p. 372, No. 206.

(2) Ibid., No. 207.

deed of sale set out; considering that the sum of money in the deed mentioned, as having been paid by Opposant to his son, Defendant, for the house and premises, was not so paid *bona fide*; considering that it has been established, by the evidence of record, that the sale was so made for the purpose of placing the house and premises beyond the immediate legal action of the creditors of Defendant, and that Defendant, notwithstanding the sale, hath continued to possess and enjoy the house and premises uninterruptedly, and that the deed of sale was made and executed by and between Defendant and Opposant, parties thereto, knowingly and purposely with a fraudulent intent, and that the deed of sale was and is therefore fraudulent; considering that, in the judgment pronounced by the Superior Court, at the city of Montreal, on the 30th day of September, 1861, dismissing the contestation by Appellant, of the opposition of Respondent in the Court below, there is error, this Court doth reverse and set aside the judgment of the 30th day of September, 1861, and, proceeding to render the judgment which the Court below ought to have rendered, doth maintain the contestation of Appellant against the opposition made and filed by Respondent, Opposant in the Court below, to the seizure and sale of the house and premises, under and by virtue of the writ of execution *de terris* issued out of the Superior Court at the suit of Appellant, Plaintiff, and, declaring the deed of sale, executed between Defendant and Opposant, to be and to have been fraudulent, null and void, doth annul and set aside the same, and doth declare Defendant to have been, at the time of the seizure and taking in execution of the house and premises, the owner of the same, and, finally, doth dismiss the opposition of Opposant. (14 *D. T. B. C.*, p. 393.)

DOHERTY, for Appellant.

KERR, for Respondent.

PROSECUTION FOR SELLING LIQUORS WITHOUT LICENSE.

SUPERIOR COURT, Montreal, 31st December, 1862.

Coram SMITH, J.

Exparte JOHN MOLEY, (for a writ of Certiorari,) *and* RAPHAEL BELLEMARE, (Prosecutor in the Court below.)

Held: 1. That in a prosecution for selling fermented liquors without a license, it is not necessary to negative the averment that the Defendant is not a distiller within the provisions of the 1st section of chap. 6 of the Consolidated Statutes of Lower Canada.

2. That the allegation that the Defendant sold by retail at one time

fermented liquor in a less quantity than three gallons, to wit: three glasses of beer, is sufficient and legal and that such an allegation of an offence committed on a day certain, "and at divers times before and after," does not include several offences, it being conformable to the form of declaration given in the said chap. 6, C. S. of L. C.

3. That by chap. 6 of the Consolidated Statutes of Lower Canada, the convicting magistrate has a discretionary power of giving any one of the three judgments mentioned in section 32, sub-section 2, section 38 and 39 and section 40.

4. That the convicting magistrate has the right to grant costs either upon conviction or dismissal of the prosecution and even to attorneys. (1)

In this case, the information and conviction were for the offence of retailing fermented liquor without license. The information was as follows: "For that, whereas said John Moley did, at the City of Montreal, in said second division, in the District aforesaid, to wit: in the house and premises there situate and occupied by him, on the 30th day of October, 1862, and, at sundry times before and since, sell, by retail, in a quantity less than three gallons at one time, certain fermented liquor, to wit: three glasses of beer, without having previously obtained a license required by the provisions of the Statute and, contrary to the Statute in such case made and provided: whereby and by force of the said Statute, Moley hath become liable to pay the sum of fifty dollars." On the day assigned in the summons, Defendant appeared by his attorney, B. Devlin, as he had a right to do, under the Consolidated Statutes of Canada. chap. 103, sec. 30, before the judge of the Sessions of the Peace for the City of Montreal, and pleaded not guilty. Whereupon, proof being made of the offence, Defendant was, on the 18th November, 1862, condemned by the judge of the Sessions of the Peace for the City of Montreal, to pay the penalty of £12 10s., with costs to the prosecutor. The conviction was as follows: "Be it remembered that, on the eighteenth day of November, 1862, at the City of Montreal, in the District of Montreal, John Moley, of the City of Montreal, in the District of Montreal, within the first division of the District of Montreal for revenue purposes, trader, is convicted before the undersigned, Charles-Joseph Coursol, judge of the Sessions of the Peace, in and for the City of Montreal, for that, he, Moley did, at the City of Montreal, in the house and premises there situate and occupied by him, and within the first division of the District of Montreal, for revenue purposes, on the thirtieth day of October last past, and at sundry times before and since, sell by retail, in a quantity less than three gallons at one time, certain fermented liquor, to wit:

(1) *Vide* Sec. 53 and 54 chap. 103, of the Consolidated Statutes of Canada; S. R. du C. de 1886, ch. 178, s. 59, 60 et 61. Saunder's Practice of Justice's Courts, upon Jervi's acts, pp. 69, 70; art. 898 S. R. Q.

three glasses of beer; without having previously obtained the license required by the provisions of the Statute in such case made and provided, contrary to the statute in such case made and provided, whereby he hath forfeited, and I, judge of the Sessions of the Peace in and for the City of Montreal, do adjudge John Moley, for his said offence, to have forfeited and to pay to Raphael Bellemare, of the city of Montreal, collector of Inland Revenue for the first division of the District of Montreal, for revenue purposes, the sum of fifty dollars, current money of this Province, and also to pay to Bellemare the sum of six dollars and sixty three cents, amount of costs by me allowed and adjudged to be paid to Bellemare for his costs in this behalf. And, in default of immediate payment of said several sums, I order that the same be levied by distress and sale of the goods and chattels of Moley: and, in default of such goods and chattels, or in case of their being insufficient, I do further order and adjudge, that Moley be committed to the common jail, at the city of Montreal, for the period of three months, unless the said several sums of money, and the costs and charges of the said distress, commitment, and of the conveying of Moley to the said common jail, shall be sooner paid. Given under my hand and seal, the day and year first above mentioned, at the city of Montreal, in the district of Montreal aforesaid. Signed, CHAS. J. COURSOL, Judge of the Sessions of the Peace." The Defendant moved the Superior Court for the district of Montreal, on the 20th December, 1862, for a writ of certiorari to issue upon the following grounds, contained in his affidavit of circumstances, to wit: 1. Because no legal offence was charged against deponent upon which to base said judgment; 2. because it does not appear, by the declaration, summons, or prosecution, that deponent sold by retail, at one time, in a quantity less than three gallons, certained fermented liquor, as therein pretended; 3. because, even assuming that it was properly alleged that he sold by retail certain fermented liquor, in a less quantity than three gallons at one time, there is no allegation in the declaration, summons, or prosecution to indicate that he had not a right so to do, on the contrary, it is expressly enacted by the statute in this behalf, that distillers may sell by retail in a less quantity than three gallons at one time any kind of fermented liquor, and in no part of the said proceedings so had against deponent, is it alleged that he was not at the time of such pretended sale a distiller; 4. because no such prosecution as is hereby complained of can be brought or commenced, except it is so commenced within six months after the alleged offence, and no such allegation has been made in the prosecution of this complaint, nor does it appear, with legal certainty, when the pretended offence was

committed; 5. because it does not appear, by the statute in this case made and provided, in what place the sale of fermented or any other kinds of spirituous liquors is prohibited without a license; 6. because it does not appear, by said judgment when the alleged offence was committed, nor at what particular time or place; 7. because the corporeal punishment substituted for the penalty to which deponent was condemned as aforesaid, in the event of non-payment, does not extend to the costs or at any rate to any greater sum than that amount of costs awarded by the judgment, to wit: the sum of six dollars and sixty three cents mentioned in the said judgment; 8. because it does not appear by the judgment what amount of costs deponent is condemned to pay, and also because he is condemned to pay not only the penalty of fifty dollars and the costs thereon incurred, but also all the costs and charges of distress, commitment, and of conveying deponent to jail, in the event of his not paying said penalty and costs, amounting to six dollars and sixty three cents, without in any way limiting the additional costs imposed by the judgment; 9. because the judgment orders, in the event of the non-payment of the penalty and costs thereon incurred, a sale of the goods and chattels of deponent, without it appearing in any way that deponent was, by Charles Joseph Coursol, called upon to declare whether or not he possessed sufficient goods and chattels to satisfy the judgment and costs; 10. because several offences were in and by said prosecution alleged against deponent, without, however, the time and place of each pretended offence being in any way given or made known to him; 11. because it does not appear, in and by the judgment, whether it was rendered on the confession of deponent or upon the evidence of one or more witness or witnesses as is by law required. Devlin urged in support of the motion: 1. That the enacting clause creating the offence was the first section of chapter 6 of the consolidated statutes of Lower-Canada; 2. that the negative averment that Defendant was not a duly licensed distiller according to the provisions of that clause, ought to have been made in the prosecution; 3. that the prosecution had been brought under that clause, and that, in the absence of that negative averment, the judge of the sessions of the peace had no jurisdiction, and that the writ of certiorari, although taken away by statute, ought to be granted, when such a want of jurisdiction is apparent. Paley, *On conviction*, p. 104-192, etc., p. 196, " preceding clause " &c.; 4. that the allegation that Defendant sold by retail fermented liquor in a less quantity than three gallons at one time, to wit: *three glasses of beer*, implies that he may have sold more than three gallons, the dimensions of such glasses being unknown to

the law ; 5. that the conviction did not state whether Defendant was so convicted upon his own confession or upon evidence, nor that the offence had been committed within 6 months ; 6. that the information alleged several offences, and that, by the conviction Defendant was convicted of his said offence, which was a fatal error(1) ; 7. that Defendant was condemned to pay certain costs which could not be given against him, and that, particularly, he could not be imprisoned for the payment of the fee of 11s 8d, granted to the attorney for the prosecutor ; 8. that the judge of the sessions of the peace was bound by law, before granting a warrant of distress, to call upon Defendant to declare whether or not he possessed sufficient goods and chattels to satisfy the judgment and costs. LaFrenaye, *For prosecutor*, urged against the granting of the motion : 1. that such matter of excuse as contended by Appellant being found in another distinct clause, need not be specially set out or negatived. Paley, p. 205 ; Paley, *On conviction*, p. 210," but if the exception come by way of proviso," &c. ; 2. that it is sufficient to allege the sale " without any license previously obtained." Paley, p. 206-7, and 5 and 12; 1 Strange, 554, sd. 1101 ; 3 Dowl, and R. 461 ; 1 B. and Ald. 94 ; Burn's, *Justice*, vo. *Ale-houses*, p. 86, ed. of Chetwynd. Moreover a distiller duly licensed cannot sell beer. Ch. 19 Cons. S. of C. secs. 2-3 and 4 ; 3. it is not necessary to negative a mere *constructive* qualification. Paley, p. 204 ; besides the provincial statute has given a form of declaration not requiring any further negative averments than what is therein contained, and a negative averment is not necessary in a declaration for a penalty. 2 Chitty, p. 167 ; 1 T.R. 144 ; 1 Lev. 26 ; 1 East. 639 ; 2 Comyn's *Rep.* 524 ; 4. By the recent forms of conviction given by the statutes, it is a settled point that it omits all statement of the evidence, and at once proceeds to the adjudication. Paley 116, 117, 136, 137, Vide Paley, ch. 3, sec. 1, general form of conviction, &c. ; 5. that the form of conviction being given by the statutes, chap. 6, Con. S. of L. C., is sufficient in law, sec. 43 of said chap. 6. Paley, p. 134, 136, 231. The recital of the offence in the conviction being made in the same terms as those contained in the prosecution establishes that the prosecution was commenced within six months after the alleged offence, although it is only a matter of evidence. Paley, p. 155, note z, p. 43. *Wray* vs. *Toke*, new session cases. *Saunder's Practice of Mag's. Courts*, p. 13 ; 6. By the form of the Declaration D. Sec. 43, chap. 6 Cons. S. of L. C., the offence must be stated to have been committed, " and at sundry times before and since," which form being *legalized* by said section 43, must be followed. In

(1) Cons. St. of C, ch. 103, sec. 25.

Exparte Allison, 24 L. J., p. 217, Baron Parke said, " if the justices conform with the form given, it shall be sufficient, otherwise the act would be nothing but a trap." Paley, 155; 7. That by the Cons. S. of L. C., ch. 98, all such objections to the plaint and incidental proceedings, if not raised before the Justice of the peace are not available and are considered waived, and cannot therefore be taken advantage of by *certiorari* when that writ has been taken away by statute, as it is the case under said chap. 6, Cons. S. of L. C., sec. 49. Paley, p. 73; 2 *Chitty's Genl, Practice*, p. 225; 8. That the judge of the sessions of the peace has the power of giving any one, out of three different judgments, according to the provisions of sections 32, sub-section 2, 28, 39 and 40, ch. 6 Cons. S. of L. C., 2 *Chittys Genl. Practice*, p. 213. 9. That this alternative power is " subject to the discretion vested in him," by said sub-section 2. 10. That by sub-section 2 of section 37, ch. 6, Cons. S. of L. C., the costs as are awarded " and all costs, whether incurred upon or after conviction," are to be levied in the same way as the penalty by distress or corporeal punishment. Vide *Oake's Synopsis*, p. 106, note C; where the inconvenience of a different law in England is noticed, which is the Imp. Act 18 Geo. 3, ch. 19, vide also Paley p. 240, 241, Burns' Justice v. *Ale-houses*, p. 90. Ed. of Chetwynd, 1825, as to the form of commitment, &c., upon a similar charge. 11. The justices, under the provisions of sections 53 and 54 of chap. 103 of the Cons. S. of Canada, have the right to grant costs even to the attorneys, either upon conviction or upon the dismissal of the plaint. See Saunder's *Practice of Magistrates' Courts*, p. 69, 70, upon the same law, *Jervis Acts* in England. 12. That the justices must be guided, by the statute which gives them jurisdiction in the particular proceeding. The ch. 6, Cons. S. of L. C. is complete by itself, and the forms therein given are held sufficient in law, 2 *Chittys Genl. Practice*, p. 209. 13. The judge of the Session of the Peace, by section 61, ch. 102, and by section 82, chap. 103 of the Cons. S. of Canada, and by section 3, chap. 102 of the Cons. S. of L. C. is vested with all the powers of two Justices of the Peace. Writ refused. (7 *J.*, p. 1.)

B. DEVLIN, for Moley.

LAFRENAYE, for Bellemare.

LICENCE ACT.—CERTIORARI.

SUPERIOR COURT, Montreal, 31st December 1862.

Coram BADGLEY, J.

DOMINA REGINA, on application of William G. Slack, for a writ of Certiorari, *and* RAPHAEL BELLEMARE, Prosecutor in the court below.

Held: That a conviction for one month instead of two months imprisonment is bad, inasmuch as a judgment for too little is as faulty as a judgment for too much. (1)

2° That such a conviction must be quashed for want of jurisdiction.

3° That if it had been an order instead of a conviction it could have been amended by the Superior Court. (2)

4° That in such a case, no costs are to be given against a collector of Inland Revenue prosecuting in the execution of a public duty.

5° That the judge of the Sessions of the Peace being vested with all the powers of two justices of the peace by sec. 61, ch. 102 and by sec. 82, ch. 103 of the Consolidated Statutes of Canada, and by sec. 3, ch. 102 of the Con. Stat. of Lower Canada; no appeal lies from such a conviction rendered by him under ch. 6 of the Consolidated Statutes of Lower Canada.

This was a rule to quash a conviction by Charles Joseph Coursol, judge of the Sessions of the Peace in and for the city of Montreal, at a special Session of the Peace, for offending against the provisions of Chap. 6 of the Consolidated Statutes of Lower Canada. The prosecution, in the court below, alleged that William G. Slack did, at the city of Montreal, in the district aforesaid, to wit: in the house and premises there situated and occupied by him, Slack, on the twenty-second day of November 1862, and at sundry times before and since, keep a place of public entertainment, without having previously obtained the License required by the Provisions of the statute in such case made and provided, contrary to the statute in such case made and provided, whereby and by force of the said Statute, Slack hath become liable to pay the sum of fifty dollars. Proof was made by the informer that he took a supper in Defendant's house on the day named in the information, for which he paid one shilling to Defendant; and that the table is always laid out for the reception of travellers, whom he saw eating there at a same table. This proof was corroborated by another witness. The conviction declared that, " on the tenth day of December 1862, at the city of Montreal, in the district of Montreal, William G. Slack, of the city of Montreal, in the District of Montreal, within the first Division of the said District of Montreal for revenue purpose, Trader, is convicted

(1) Paley, *on convic.*, Ed. of 1856, p. 231 and note n.

(2) Paley, *on convic.*, Ed. of 1856, pages 143, 232.

before the undersigned, Charles Joseph Coursol, Judge of the Sessions of the Peace in and for the City of Montreal for that he Slack did, at the City of Montreal, in the house and premises there situate and occupied by him and within the first Division of the said District of Montreal for Revenue purposes, on the twenty-second day of November last past, and at sundry times before and since, keep a place of public entertainment, without having previously obtained the License required by the provisions of the Statute in such case made and provided, contrary to the statute in such case made and provided whereby he, Slack, hath forfeited, and I, the Judge of the Sessions of the Peace in and for the City of Montreal, do adjudge Slack, for his said offence, to have forfeited and to pay to Raphael Bellemare. of the said city of Montreal, Collector of Inland Revenue for the first division of the District of Montreal for Revenue purposes, the sum of fifty dollars, and also to pay to Raphael Bellemare the sum of $50, and also to pay to Raphael Bellemare the sum of $8.93, amount of costs by me allowed and adjudged to be paid to Bellemare for his costs in this behalf. And, in default of immediate payment of the said several sums, I order that the same be levied by distress and sale of the goods and chattels of Slack ; and, in default of such goods and chattels, or in case of their being insufficient, I do further order and adjudge, that Slack be committed to the Common Goal, at the City of Montreal, for a period of one month, unless the said several sums of money, and the costs and charges of the distress, commitment, and of the conveying Slack to the Common Goal, shall be sooner paid. Given under my Hand and Seal, the day and year first above mentioned, at the City of Montreal, in the District of Montreal aforesaid. (Signed), CHARLES J. COURSOL, *Judge of the Sessions of the Peace.*" The notice of a motion for a writ of *Certiorari* was served upon the Judge of the Sessions of the Peace, on the 10th December, 1862, the day upon which the conviction was rendered ; so that if an appeal could lie against that judgment according to the provisions of Sections 50 and 51 of Chap. 6, Consolidated Statutes of Lower Canada, the notice of motion was premature, as the delay, for an appeal, (the 24 hours' notice) had not yet elapsed when that notice was served upon the judge of the Sessions of the Peace. This point was submitted at the time of the argument upon the the merits of the certiorari. The affidavit of circumstances set up the following grounds of objection, viz : 1° Because Charles Joseph Coursol had no jurisdiction on the subject matter of the pretended complaint and could not by law take cognizance thereof ; 2° Because no legal offence was alleged against this deponent ; 3° Because there was no allegation in the De-

claration or summons to indicate the commission of an offence against any law in force in this Province, or which could give to Coursol jurisdiction to condemn Deponent to the payment of the said fine and costs, or, in default thereof, to an imprisonment of one month in the Common Goal; 4° Because there was no fact alleged in the Declaration or summons, to show that Deponent kept a house or place of public entertainment which required him to procure a license or which showed that in not doing so he had offended against any statute in force in this Province; 5° Because the judgment is excessive and not warranted by any law in force in this Province, and is moreover oppressive and is entirely unsupported by any fact to justify the rendering of such judgment.

DEVLIN, in support of the rule, urged the following reasons: 1st. That Defendant did not keep a place ofpublic entertainment and could not be convicted of such an offence; 2nd. that no proof of such an offence had been made against the petitioner; 3rd. that the conviction was bad, inasmuch as it was not warranted by any law in force in this Province; 4th. That the conviction was also bad in awarding costs to the attorney for the prosecutor in the Court below.

LAFRENAYE, for Prosecutor, contended upon the merits of the prosecution and the proof thereof: (1) 1st. The Prosecutor is not bound to prove all the ingredients constituting a house of public entertainment according to the requirements of sect. 25, ch. 6, Consolidated Statutes of Lower Canada, no more than in an indictment he is bound to prove the number of the articles stolen. Proving the larceny of one or more of the articles, is sufficient to constitute the offence, although the prosecution fail in his proof of the rest. *Vide* Archbold's pleading and evidence, p. 50, Ed. of 1862. 2nd. In proving that Defendant was "constantly supplied with a sufficient quantity of provisions," being one of the necessary ingredients of the duty

(1) Coursol, J. S. P.: The law requires that all parties keeping a house of public entertainment must have a license, and in default shall be liable to a fine of $50. The question has been raised, whether, from the evidence, Defendant has kept a house of public entertainment within the meaning of the Statute. I consider that he has done so from the fact that people go in there andpay for what they get in the way of eating and drinking. The proof shows clearly that the informer was not there as a guest, but that he paid for his meal. Defendant did *entertain* him in his house by way of *gain and reward.* It is proved that the table is always laid out for lunch and that travellers take their lunch there. The other point raised was as to whether the information ought to have explained what a "place of public entertainment" is according to law. This objection was made after the plea of "not guilty" had been entered, and the proof on the part of the prosecution had been adduced. However, I have no hesitation in saying that the information as laid against Defendant for having kept "a house of public entertainment" is quite sufficient, because it is so mentioned in the Statute, which requires no further allegation.

of the keeper of a house of public entertainment, the offence was sufficiently proved, although the Prosecutor did not prove the rest of the requirements of said sect. 25, ch. 6. 3rd. If Defendant wishes to avoid being sued for the penalty of $20, mentioned in section 25, he must keep the different accommodations therein provided. This proposition constitutes another offence, if he has a license. 4th. If he has no license, the keeping of "any of the accommodations provided by section 25" constitutes the offence contemplated by section 22 of said chapter 6, and subjects such person who attempts to entertain the public by way of gain or reward to a penalty of $50. 5th. Sections 25 and 12 apply partly to the country and not to the city.

LAFRENAYE, further contended that, inasmuch as the prosecutor was a public officer sueing in the execution of a public duty, and that the conviction was bad from a mistake which may sometimes occur in the multiplicity of the business to be disposed of by the same magistrate in a very short time, no costs could be granted against him to petitioner; and cited the following authorities: Con. stat. L. C., ch. 89, sec. 4; samech. 98, sec. 3; *Ex parte* DeBeaujeu, 5 *R. J. R. Q.*, p. 371, 30th December, 1856. *Coram* Day, J., Smith, J., Badgley, J. (1); *Ex parte* Leonard, 1 L. C. Jurist, p. 255. 30th Sept., 1857. *Coram* Day, J., Smith, J., Mondelet, J. (2) *Ex parte* Hogue, divers others and Bellehumeur, Nos. 412 and 653, 13th April, 1853, 4 *R. J. R. Q.*, p. 14, *Coram* Day, J., Smith, J., Mondelet, J. REVENUE CASES. No costs granted. This case had come before the court on certiorari, to quash the conviction for selling liquor without license; the court had previously quashed these convictions, but they now came up again to decide whether they should be quashed with costs against the Revenue Inspector in whose name the information had been laid. The Revenue Inspector was a public officer, and had brought these informations under the 14 and 15

(1) Dans la cause de De Beaujeu, *ex parte*, C. S. Montréal, 30 décembre 1856, Day, J., Smith, J.. et Badgley, J., 5 *R. J. R. Q.*, p. 371, il a été jugé que la cour, en vertu des pouvoirs discrétionnaires qui lui sont conférés par la section 2 du ch. 97 du statut 18 Vict., qui se lit comme suit : " La cour à laquelle appel sera interjeté de la conviction, jugement ou décision d'un juge de paix ou de juges de paix, dans les cas de convictions sommaires, ou à laquelle une cause sera évoquée par un bref de certiorari, pourra accorder ou ne pas accorder à sa discrétion les dépens à la partie en faveur de qui jugement aura été rendu, ou contre l'Appelant, nonobstant toute loi à ce contraire," n'accordera pas de frais contre un officier public dans les cas où cet officier public n'est poursuivant que dans l'exécution de son devoir.

(2) Dans la cause de Léonard, *ex parte*, requérant *certiorari*, C. S., 30 septembre 1857, Day, J., Smith, J., et C. Mondelet, J., 1 *J.*, p. 255, il a été jugé qu'en vertu du § 2, du ch. 97 du stat. 18 Vict., les frais sur la mise au néant d'une condamnation dans une poursuite par un officier public sont à la discrétion de la cour.

Vict., ch. 100. They had been laid according to the forms to be found in that Statute. The real point to be considered was this: Did the Revenue Inspector render himself liable for the costs in the quashing of these convictions while sueing as a public officer of the Crown? The court was of opinion that, by the common law of England, by which this Statute ought to be interpreted. Defendants could obtain no costs against the Crown. By a Statute of Elizabeth, officers who sued in the name of the Crown, could not be held liable for the costs, and it was a settled rule that the Crown could not give or take costs. But it was also a rule that informers who issued *qui tam* informations *were* liable, but not even then, when a part of the penalty went to the Crown. By reference to the Provincial Act, under which the present informations were taken, it appeared that one part of the penalty went to the Crown, and in some instances the whole. By the 31st section, the Inspector was compelled to examine taverns and institute these actions against parties who violated that Statute. Now it seemed hard that he should be compelled to pay costs in action which he was compelled to make as a public officer. He certainly came within the rules referred to, where costs were not recoverable. The convictions in these cases must be quashed without costs. Bacon's abridg. *vo.* costs, letter E, No. 3. *Ex parte* Walsh, full bench, 26th April, 1853. Conviction granted but without costs against the Revenue Inspector. (1) This case came up on a question of costs against the Revenue Inspector, similar to that in *Ex parte* Hogue and others. In that case, the court decided that, in quashing informations made by the Revenue Inspector, they would give no costs. The court observed that there was no doubt that the present conviction would have to be quashed but that after another careful consideration of the arguments, the court had determined to adhere to its former decision respecting the costs.

BADGLEY, J.: There is no doubt that the conviction is bad and must be quashed, but without costs. If it had been an order instead of a conviction the court would have felt bound to correct the mistake, and to give the judgment which ought to have been given by the magistrate. But the court cannot amend a conviction, and therefore has no alternative but to quash it. No appeal lies from the decision given in such a case by the judge of the Sessions of the Peace, and the certiorari was the proper proceeding to bring the conviction before this court: "The court, considering that the conviction complained of by Petitioner rendered against him on the 10th day of December instant, by the judge of the Sessions of the Peace,

(1) *Ex parte* Walsh, for certiorari, Montreal, 26th April, 1853.

in and for the city of Montreal, whereby, amongst other things, Petitioner is subjected to an imprisonment of one month, is not founded on any law, and is moreover contrary to law; and, considering that said conviction is in law an entire judgment and indivisible, and being faulty as above is vitiated in the whole, doth quash the said conviction without costs. (6 *J.*, p. 6.)

B. DEVLIN, attorney for Slack.

LAFRENAYE, attorney for Bellemare.

PARTAGE DE BIENS SUBSTITUES.

COUR SUPÉRIEURE, Montréal, 31 décembre 1862.

Coram MONK, J.

DUMONT *vs.* DUMONT.

Jugé: 1° Que, dans l'espèce, une substitution fidéi-commissaire étant faite en terme collectif, les biens substitués doivent se partager entre les appelés par souches et non par têtes, *ou*

2° Que la transmission des biens laissés à deux enfants à charge de substitution graduelle en faveur de leurs descendants, se fait par souches.

3° Que, dans l'espèce, la substitution s'ouvrant en faveur d'un des appelés, avant de s'ouvrir pour les autres, cet appelé peut immédiatement demander sa part, sans attendre l'ouverture de la substitution en faveur de ses co-appelés.

Cette cause est une action en partage de biens substitués, intentée par Marguerite Virginie Dumont, épouse de Charles-Auguste-Maximilien Globenski, contre Elmire Dumont (Madame Laviolette), comme grevée de substitution, Godefroi Laviolette, comme tuteur *ad hoc*, et Joseph Lefebvre de Bellefeuille, comme tuteur à la substitution. Les faits qu'il est nécessaire de connaître pour bien comprendre la nature de cette cause, sont les suivants: Louis-Eustache-Lambert Dumont, le bisaïeul de la Demanderesse, est décédé à Saint-Eustache, le 12 avril, 1807, laissant deux enfants vivants, Nicholas-Eustache Lambert Dumont, et Marie-Louise-Angélique Lambert Dumont, épouse de Antoine Lefebvre de Bellefeuille. Son testament olographe, en date du onze Octobre 1805, contenait les dispositions suivantes: " Désirant conserver le bien de ma famille, et voulant pourvoir à l'avantage de mes enfants, petits-enfants et arrière-petits-enfants. J'ordonne, par ces présentes, que Nicholas-Eustache Dumont, et Marie-Louise-Angélique Dumont, mon fils et ma fille, ne pourront vendre, engager ni aliéner aucune partie des moulins et de ma seigneurie

que je délaisserai à mon décès, qui pourront leur échoir pour pour part et portion héréditaire de ma succession, eux et leurs enfants nés et à naître, et qu'ils se contentent de jouir eux et leurs descendants, jusqu'au terme fixé, du revenu seulement de leurs dites parts et portions héréditaires ; aux charges de toutes redevances dont les dits biens peuvent être chargés. J'ordonne pareillement, qu'après le décès des dits Nicolas Eustache Lambert Dumont, et Marie Louise Angélique Lambert Dumont, leurs enfants nés en légitime mariage, jouiront aussi leur vie durant de leur part et portion héréditaire dans les dits biens. Quant au fonds et propriété du dit fief et des moulins, je les donne et lègue à mes arrière-petits-enfants à naître en légitime mariage de mes petits enfants, pour en jouir, faire et disposer par eux leurs hoirs et ayants cause en pleine propriété, après le décès, toutefois, de leur père et mère descendant de ma ligne, auxquels ainsi qu'à mes enfants susnommés, leurs ayeuls et ayeules, je substitue par ces présentes les dits arrière-petits-enfants, ainsi est ma volonté." Après le décès du testateur, ses deux enfants, Nicolas Eustache Lambert Dumont et Marie Louise Angélique Lambert Dumont, entrèrent en possession des biens de leur père, à charge de substitution, et les possédèrent et en jouirent leur vie durant. Nicolas Eustache Lambert Dumont, le fils du testateur, laissa lors de son décès trois enfants, savoir, Elmire Dumont, la Défenderesse, Louis Charles Lambert Dumont, le père de la Demanderesse, et Sévère Dumont, mort depuis sans enfants. Du mariage de Elmire Dumont avec feu Pierre Laviolette sont nés sept enfants encore vivants, dont Godefroi, l'un des Défendeurs en cette cause, est l'aîné. Louis Charles Lambert Dumont, n'a laissé qu'un enfant, savoir, Marguerite Virginie Dumont, la Demanderesse. Marie Louise Angélique Lambert Dumont, la fille du testateur, laissa à son décès, quatre enfants issus de son mariage avec Antoine Lefebvre de Bellefeuille, savoir : Eustache Antoine Lefebvre de Bellefeuille, Joseph Lefebvre de Bellefeuille, l'un des Défendeurs, et Louis Charles et François Louis Lefebvre de Bellefeuille, morts tous deux sans enfants. Eustache Antoine Lefebvre de Bellefeuille a laissé trois enfants, issus de son mariage avec Marguerite McGillis, qui sont encore vivants. Du mariage de Joseph Lefebvre de Bellefeuille avec Caroline Flavie Leprohon, sont nés trois enfants aujourd'hui vivants. Il y avait donc vivants, lors de l'institution de cette action, deux petits enfants du testateur, et quatorze arrière-petits-enfants provenant de quatre différentes souches, deux ayant pour auteur commun le fils, et les deux autres la fille du testateur ; tous soumis à la loi du testament. Les biens du testateur qui consistaient en la Seigneurie des Mille-Isles furent partagés en 1808, par Delisle et

Chaboillez, arbitres nommés par les parties. En vertu de ce partage, Nicolas Eustache Lambert Dumont prit possession des deux tiers des biens régis par le testament, et Madame de Bellefeuille eut l'autre tiers. La présente action repose sur l'idée que, la part des biens du testateur échue par le partage à Nicolas Eustache Lambert Dumont s'est trouvée pour toujours attribuée à sa souche. Voici comment la Demanderesse développait cette idée dans sa déclaration en date du premier Octobre, 1861: Depuis la mort de Nicolas Eustache Lambert Dumont, ses trois enfants, sont entrés en possession et en jouissance des dits biens qu'ils ont recueillis à charge de substitution en faveur de leurs enfants, par et en vertu du testament de leur aïeul, Louis Eustache Lambert Dumont, à la succession duquel ils venaient à titre de grevés en vertu du dit testament, et qu'ils en ont ainsi joui et les ont ainsi possédés en commun et par indivis jusqu'au 1er Novembre, 1841, jour du décès de Louis Charles Lambert Dumont, puis ensuite la Défenderesse et la Demanderesse comme représentant Charles Lambert Dumont, son père, et Louis Sévère Dumont, jusqu'au 26 décembre, 1841, jour du décès de Louis Sévère Dumont, et, depuis lors, la Défenderesse et la Demanderesse, lesquelles en leurs titres et droits respectifs, en jouissent et les possèdent encore en commun et par indivis, et sont maintenant, en leurs titres et droits respectifs, les seuls héritiers et représentants légaux du testateur, quant aux dits biens comme étant les seuls descendants de Nicolas Eustache Lambert Dumont, à qui ils sont échus par le partage; que la substitution créée et établie par le testament de Louis Eustache Lambert Dumont est relativement à la Demanderesse arrivée à son dernier degré, la Demanderesse étant la dernière appelée à recueillir la part et portion à elle afférant dans les dits biens; que la Demanderesse a droit à la moitié des biens à elle transmise et parvenue de ses père et aïeul en vertu du testament ci-haut relaté. De ces prémisses, la Demanderesse concluait à être déclarée, en son nom personnel, propriétaire définitive, par et en vertu du testament de Louis Eustache Lambert Dumont, d'une moitié de tous les biens échus au lot de Nicolas Eustache Lambert Dumont dans le partage de 1808 et à en avoir la propriété, jouissance et possession définitive, séparément et par divis d'avec les Défendeurs, tant en leurs propres noms qu'en leurs qualités, et, qu'en conséquence, les Défendeurs, tant en leurs propres noms qu'en leurs qualités, fussent tenus de convenir d'experts avec la Demanderesse pour fixer et établir la part pour moitié qui appartiendrait définitivement à la Demanderesse d'une part, et aux Défendeurs de l'autre, sinon, que les experts fussent nommés par la cour. Elle concluait enfin à la vente des biens, s'il était constaté que

les biens ne pouvaient commodément se partager. A cette action, les Défendeurs plaidèrent séparément; Madame Laviolette et Godefroi Laviolette, d'une part, soutinrent dans leurs défenses des prétentions identiques. Admettant les faits relatés dans la déclaration des Demandeurs, les Exceptions Péremptoires de Madame Laviolette et de Godefroi Laviolette, *ès qualité*, allaient à dire, que, depuis la sentence arbitrale et, conformément à icelle et à l'esprit et l'intention du testament ci-dessus récité en partie, Nicolas Eustache Lambert Dumont a eu la jouissance et la possession des immeubles ci-dessus désignés à titre de légataire de son père, à charge de substitution en faveur des arrière-petits-enfants du testateur, lesquels devront partager les biens lors de l'ouverture de la substitution par têtes et non par souches et ce jusqu'à sa mort, arrivée le ou vers le vingt-troisième jour d'avril, 1835, dans la paroisse de St. Eustache, laissant, de son côté, pour seuls et uniques descendants du testateur, trois enfants issus de son mariage avec Marie Narcisse Lemer St-Germain, et petits enfants du testateur, savoir, la Défenderesse, née à St-Eustache le ou vers le 13 de Novembre, 1803, où elle a été baptisée sous le nom de Marie Elmire Dumont; Charles Louis Lambert Dumont, né à St-Eustache, le 12 Septembre, 1806, où il a été baptisé le même jour (père de la Demanderesse) décédé à St-Eustache le premier Novembre, 1841, où il a été inhumé sous le nom de Louis Charles Lambert Dumont; Sévère Dumont, né à St-Eustache, le 7 Octobre, 1810, et décédé le 26 Décmebre, 1841, au même lieu, où il a été inhumé sous le nom de Louis Sévère Dumont; que, depuis la mort de Nicolas Eustache Lambert Dumont, ses trois enfants sont entrés en possession et en jouissance des dits biens, qu'ils ont recueillis à charge de substitution en faveur de leurs enfants, par et en vertu du testament de leur aïeul, Louis Eustache Lambert Dumont, à la succession duquel ils venaient à titre de grevés, et qu'ils en ont ainsi joui et les ont aussi possédés en commun et par indivis jusqu'au premier Novembre, 1841, jour du décès de Louis Charles Lambert Dumont, puis ensuite la Défenderesse et Louis Sévère Dumont, jusqu'au 26 Décembre, 1841, jour du décès de Louis Sévère Dumont, et depuis lors, la Défenderesse et la Demanderesse, lesquels, en leurs titres et droits respectifs, en jouissent et les possèdent encore en commun et par indivis; que, par la mort de Louis Charles Lambert Dumont, la substitution créée par le testament de Louis Eustache Lambert Dumont s'est ouverte relativement à la Demanderesse Virginie Dumont enfant unique issue du mariage de Louis Charles Lambert Dumont avec Mary Sophia Roy Bush et arrière-petite-enfant du testateur, appelée à la substitution pour une part virile avec les autres arrière-petits-enfants du testateur

descendant de leur père Nicolas Eustache Lambert Dumont son fils aîné ; que les autres arrière-petits-enfants du testateur aussi appelés pour chacun une part virile dans les biens qui sont tombés dans le lot de Nicolas Eustache Lambert Dumont à charge de substitution, sont les seuls enfants vivants issus du mariage de Elmire Dumont avec Pierre Laviolette, savoir, Godefroi, Caroline, Laure, Camille, Alphonse, Arthur, Alfred Laviolette, lesquels seront en droit de réclamer chacun une part virile des biens en concurrence avec Virginie Dumont, c'est-à-dire, que, quand la substitution s'ouvrira en leur faveur, Godefroi, Caroline, Laure, Camille, Alphonse, Alfred, Arthur Laviolette, seront appelés à recueillir chacun un huitième des biens, c'est à savoir, de ceux dont la Demanderesse demande le partage, le dernier huitième devant appartenir à cette dernière ; que la Demanderesse, qui n'a droit qu'à un huitième dans les biens, conclut erronément à être déclarée propriétaire de la moitié d'iceux et à partager en cette proportion. Puis, les Défendeurs, après avoir déclaré ne pas s'objecter au partage, pourvu qu'il se fît suivant leurs prétentions, concluent, à ce que, par le jugement, il soit déclaré que la Demanderesse n'est propriétaire que d'un huitième dans les biens qui ont été légués à Nicolas Eustache Lambert Dumont à charge de substitution, la propriété des sept autres huitièmes reférant maintenant en la personne de la Défenderesse (Madame Laviolette) à charge de substitution, et devant s'ouvrir au profit et avantage de ses enfants ou de ceux d'entre eux qui seront vivants lors de l'ouverture de la substitution à leur égard, et que le partage qui aura lieu se fasse par têtes et non par souches, ainsi qu'injustement réclamé par la Demanderesse. Les Demandeurs, par leurs réponses aux exceptions des deux Défendeurs, Elmire Dumont et Godefroi Laviolette, niaient qu'ils pussent soulever les prétentions par eux énoncées dans leurs exceptions, relativement à la portion de Virginie Dumont dans les biens dont elle demande le partage. Les Demandeurs alléguaient de plus que le droit à la propriété de la moitié des biens, a été déterminé en dernier ressort en faveur de Virginie Dumont, dans une cause mue en la Cour Supérieure pour le district de Montréal, et jugée par cette Cour le quatre janvier, 1853, dans laquelle cause, la Défenderesse conjointement avec son époux, Pierre Laviolette, étaient Demandeurs, contre la Demanderesse actuelle alors représentée par son tuteur, Eugène Globenski ; que cette cause ayant ensuite été portée en appel, la cour du Banc de la Reine rendit le jugement suivant : " *Considérant qu'au décès de Nicolas Eustache Lambert Dumont, les biens désignés en la déclaration sont, en vertu de la substitution, passés et ont été dévolus par égales portions, à ses trois enfants, savoir : la*

Demanderesse Intimée, (Madame Laviolette), *Louis Charles Lambert Dumont nommés, et ce à la charge de substitution, au profit de leurs enfants, arrière-petits-enfants du testateur ; que, par le décès de Louis Charles Lambert Dumont, sa part dans les biens, consistant en un tiers indivis d'iceux, est passée et a été de même dévolue à Virginie Dumont, sa fille, et que, par le décès subséquent de Sévère Dumont, sans enfants, sa part dans les biens, consistant en un tiers indivis d'iceux, est passée, et a été dévolue de même par égales portions, à sa sœur la Demanderesse, et à sa mère Virginie Dumont, et qu'en conséquence, depuis cette dernière époque, les biens sont possédés par la Demanderesse l'Intimée, et Virginie Dumont, par moitié et par indivis, savoir, par la Demanderesse (Intimée) à charge de substitution, au profit de ses enfants et par Virginie Dumont, en pleine propriété."* (1) Les Demandeurs continuant de répondre aux Exceptions des Défendeurs Elmire Dumont et Godefroi Laviolette, alléguaient encore que, depuis la sentence arbitrale du 5 janvier, 1808, Nicolas Eustache Lambert Dumont a eu la jouissance des immeubles, à titre de légataire grevé de substitution en faveur de ses enfants et petits enfants, arrière-petits-enfants du testateur, lesquels seuls, savoir, aujourd'hui, la Demanderesse comme représentant Nicolas Eustache Lambert Dumont, doit avoir toute la part de Nicolas Eustache Lambert Dumont, qu'elle représente avec la Défenderesse Elmire Dumont, et non pas ainsi que celle-ci le prétend, prendre seulement une part virile dans la succession, conjointement avec tous les arrière-petits-enfants du testateur. De plus, que la Demanderesse ne peut être tenue d'attendre le décès de la Défenderesse pour sortir de l'indivis, étant propriétaire absolue de la moitié de ces biens, elle a droit d'en obtenir le partage définitif. D'un autre côté, le Défendeur Joseph Lefebvre de Bellefeuille, en sa qualité de tuteur à la substitution, plaida séparément des deux autres Défendeurs. Après avoir admis les faits qui forment la base de cette action, il allégua, à l'encontre des prétentions des Demandeurs, que la seule interprétation du testament de Louis-Eustache Lambert Dumont qui soit véritable et conforme à la loi est,

(1) Le droit d'aînesse ne peut être réclamé dans une succession testamentaire, à moins d'avoir été spécialement légué par le testateur, et la disposition contenue dans un testament que le surplus des biens nobles du testateur soit partagé entre ses deux enfants, de manière à donner à l'aîné deux tiers et à l'autre un tiers, suivant la loi des fiefs, mais en les chargeant du paiement des dettes au *pro ratâ* de leurs héritages, et le tout à charge de substitution, ne contient pas le legs d'un droit d'aînesse et ne peut donner lieu à ce droit dans aucun des degrés de la substitution. (Globenski, ès-qualité, Appellant, et Laviolette *et al.*, Intimés, C. B. R., Montréal, 11 octobre 1854, Panet, J., Aylwin, J., Meredith, J. et Caron, J., confirmant le jugement de C. S., Montreal, 4 janvier 1853, 4 *D. T. B. C.*, p. 384.)

qu'une substitution a été créée par le testateur, dont les enfants du testateur sont chargés en faveur de tous les arrière-petits-enfants collectivement, le testateur les ayant tous appelés à recueillir concurramment et collectivement ses biens, au décès de ses petits-enfants ; qu'en conséquence, le droit des arrière-petits-enfants est un droit égal et de même nature qui s'ouvrira pour tous à une seule et même époque, savoir, à l'époque du décès du dernier des petits-enfants du testateur ; que le partage fait en 1808, était nécessairement un partage temporaire, uniquement fait pour servir aux parties à icelui ; et que, par conséquent, ce partage ne saurait aucunement servir de base à une attribution de parts entre les appelés, qui n'y ont jamais été parties, ni par eux-mêmes, ni par leurs représentants légaux. Puis, le Défendeur J. L de Bellefeuille, allégua la renonciation de Louis Charles Lambert Dumont à la succession de son père Nicolas Eustache Lambert Dumont, pour s'en tenir uniquement aux dispositions du testament ; celle de Virginie Dumont, la Demanderesse à la succession de son père, et une foule d'autres de la part des ascendants et des collatéraux de la Demanderesse ; lesquelles renonciations doivent avoir pour effet de faire régler et décider les droits des petits-enfants et arrière-petits-enfants uniquement par les termes du testament, et conformément à la nature et à l'étendue de la substitution créée par ce testament. Le Défendeur, J. L de Bellefeuille, dit de plus, que la possession qu'ont pu avoir des biens substitués, les petits-enfants et arrière-petits-enfants, a nécessairement été une possession temporaire et précaire, et n'a pu conférer aucun droit à tout tel possesseur contraire aux termes du testament ; que jusqu'au décès de Elmire Dumont et de lui-même, Joseph Lefebvre de Bellefeuille, Virginie Dumont n'a aucun droit actuel formé ou en espérance qui puisse servir de base à sa demande en partage ; qu'aucun partage définitif et final autre qu'un partage définitif de l'ensemble des biens substitués, attribuant à chacun des arrière-petits-enfants la part qu'il a droit d'avoir, ne peut se faire et par la loi et par les termes du testament. Le Défendeur soutient ensuite qu'en vertu des clauses du testament, les arrière-petits-enfants du testateur ont précisément les mêmes droits que Virginie Dumont, la Demanderesse : que les enfants de Elmire Dumont, d'Eustache Antoine Lefebvre de Bellefeuille et de Joseph Lefebvre de Bellefeuille, sont tous en semblable degré vis-à-vis du testateur avec Virginie Dumont ; que, si la Demanderesse est appelée par le testament, c'est uniquement dans et par la clause qui appelle ses cousins et cousines. Qu'en vertu de cette clause, tous les arrière-petits-enfants du testateur sont appelés comme tels arrière-petits-enfants, et que tous les droits que peut avoir ou

prétendre avoir la Demanderesse, elle ne peut les avoir ou prétendre avoir qu'en sa qualité d'arrière-petite-enfant du testateur et en vertu de la clause ci-haut récitée, et non autrement; qu'à l'ouverture de la subsitution créée par le testament en faveur des arrière-petits-enfants, la Demanderesse, en sa qualité d'arrière-petite-enfant, prendra, de son chef et non autrement, en vertu de la dite clause, de la même manière et dans la même étendue que prendront ses cousins et cousines, les autres arrière-petits-enfants, et que ces derniers et chacun d'eux auront droit à une part dans l'ensemble des biens substitués égale à celle de la Demanderesse, au cas où elle survivrait les petits-enfants du testateur ; qu'en conséquence, la part à être attribuée par la cour à la Demanderesse, dans l'ensemble des biens substitués, ne saurait être plus considérable que celle de tous et chacun des autres arrière-petits-enfants du testateur; et que les prétentions au contraire émises par la Demanderesse en sa déclaration sont mal fondées, et qu'aucun autre partage qu'un partage attribuant à tous et chacun les arrière-petits-enfants du testateur en degré égal avec la Demanderesse, une part égale à celle qui sera attribuée à la Demanderesse, ne saurait être ordonné par la cour, et qu'en conséquence, au cas où un partage serait ordonné, nulle part plus forte que celle d'un quatorzième ne saurait être attribuée à la Demanderesse dans l'ensemble des biens substitués. Le Défendeur J. L. de Bellefeuille, se plaignit ensuite de certaines injustices commises, suivant lui, dans le partage des moulins et des rentes constituées fait en 1808, prétendant que ce partage n'avait pas été fait suivant les termes du testament. Après avoir établi, à l'enquête, la perte que ce partage avait pu faire subir à une branche de la famille, les autres faits sur lesquels repose l'action étant admis, le Défendeur conclut au débouté de l'action, et, au cas de partage définitif des biens substitués, à ce que la part de la Demanderesse fût déclarée être un quatorzième seulement dans la totalité des biens substitués, se réservant tout recours au sujet du partage des constituts et des moulins. Aux exceptions péremptoires du Défendeur, J. L. de Bellefeuille, les Demandeurs répondirent spécialement : que le Défendeur est non recevable à se plaindre du partage de 1808 ; qu'il n'allègue aucun moyen de nullité à l'encontre du partage, lequel fut fait entre ses auteurs et ceux de la Demanderesse, reconnu, approuvé et ratifié par eux, par le Défendeur lui-même et par tous les grevés de substitution, les deux familles Dumont et de Bellefeuille, ayant toujours depuis cette époque joui de leurs parts respectives, conformément au partage ; que les renonciations alléguées par le Défendeur ne peuvent en aucune manière militer contre les droits de la Demanderesse ; que la non-ouverture de la partie de la

substitution dévolue aux enfants de la Défenderesse ne peut empêcher la Demanderesse de demander la jouissance de la part des biens dont elle est aujourd'hui propriétaire absolue. Enfin, que le Défendeur, J. L. de Bellefeuille, n'allègue à l'encontre du partage de 1808 aucun moyen suffisant pour en motiver la nullité ou la rescision ; car l'inégalité du partage des rentes constituées n'a été faite par les arbitres, et n'a dû être faite que pour équilibrer les parts et portions héréditaires, conformément aux dispositions du testament.

A l'argument, Laflamme, pour les Demandeurs, appuya ses prétentions sur les motifs suivants : Deux questions, dit-il, s'élèvent entre les parties : 1° Les appelés à une substitution représentant différentes souches de grevés, doivent-ils uniquement partager entre eux les biens qui leurs sont parvenus du premier grevé qu'ils représentent, ou bien doivent-ils partager tous ensemble et par tête, la masse entière des biens substitués, sans égard à la portion originairement donnée à chaque grevé. En d'autres mots, lorsqu'il y a plusieurs grevés, qui chacun transmettent à leurs descendants leur portion héréditaire dans les biens, doit-on faire abstraction de cette division et transmission pour partager entre les appelés par tête et non par souches ? 2° L'appelé à la substitution, seul représentant d'un des premiers grevés, pour obtenir la distraction de sa part dans les biens substitués, doit-il attendre que la substitution soit définitivement ouverte pour les autres souches ? En faveur de son opinion, Laflamme apporte d'abord les considérants du jugement de la Cour d'Appel dans l'affaire de *Globenski* et *Laviolette*, cité plus haut. Puis il ajoute, qu'indépendamment de ce jugement, il ne peut y avoir de question quant au droit de la Demanderesse à la propriété de la moitié des biens dont elle demande le partage ; car les termes du testament et les principes en matière de substitution lui garantissent ce droit : 1° *Les termes du testament.* Il établit ses deux enfants, son fils et sa fille, légataires universels, voulant qu'eux et leurs descendants jouissent chacun de leur portion héréditaire, donnant et léguant à ses arrière-petits-enfants, la pleine propriété," *après le décès de leurs père et mère,* AUXQUELS *ainsi qu'à mes enfants susnommés leurs ayeuls et ayeules, je* SUBSTITUE *les dits arrière-petits-enfants.*" La substitution est faite des biens légués à ses enfants. Quels sont ces biens ou quelle proportion ? C'est deux tiers pour le fils et un pour la fille. Ses enfants sont les premiers grevés, ou chargés de transmettre à leurs petits enfants les biens qu'ils reçoivent, savoir, leurs parts et portions héréditaires. On ne peut assurément prétendre qu'ils soient chargés de rendre ce qu'il n'ont jamais reçu. La transmission se fait aux termes du testament de leurs portions héréditaires en ligne directe ; et les arrière-petits-enfants sont

substitués à leur père et mère et à leurs ayeuls, pour leur portion héréditaire respectivement. Les arrière-petits-enfants ne peuvent évidemment réclamer que cette portion dont leurs père et mère jouissaient, car c'est là ce que les grevés étaient tenus de leur rendre, et qui pour eux et leurs descendants constituait exclusivement la substitution. Les substitués recueillent les biens par les mains et par le canal de la personne à laquelle ils sont substitués. Or, prenant les biens qu'ils ont à recueillir, les petits enfants n'ont que ceux qu'ils ont reçus par le canal du premier grevé, et ainsi de degré en degré jusqu'à l'ouverture de la substitution. Si on considère la personne à laquelle ils sont substitués, on arrive encore au même résultat ; ils sont substitués d'abord à leur père, qui lui, était substitué au sien. Il est impossible de faire remonter cette transmission en dehors des règles ordinaires de succession pour établir, sans termes exprès, une substitution d'une ligne à une autre, car c'est là la prétention des Défendeurs, qui ne peut être justifié par aucune disposition du testament, ou par aucune autorité. 2° *Les principes de droit en matière de substitution.* La principale règle sur l'interprétation des substitutions est, qu'on doit rechercher ce qu'a voulu l'auteur de la substitution, sans s'attacher aux termes. Le testateur, lorsqu'il ne déclare pas le contraire, est censé avoir modelé sa disposition sur celle de la loi. Les prétentions des Défendeurs vont à établir dans la succession un fidéi-commis réciproque ; or, il suffit pour ne point admettre de fidéi-commis réciproque, que la disposition du testament puisse s'entendre et s'exécuter d'une autre manière. Ce qui est jugé sur des actions actives et passives, avant l'ouverture de la substitution, avec le grevé, doit tenir après l'ouverture de la substitution ; et lorsque la chose a passé en force de chose jugée, le substitué ne peut pas revenir contre, pourvu néanmoins que le grevé se soit défendu, et que l'arrêt ou jugement ait été rendu sur les conclusions des gens du roi. (Pothier, *Substitution*, sec. 5, art. 1.) Laflamme rapporte ces paroles de Merlin, (*Répertoire*, t. 16, p. 696, § 12) : " La substitution linéale est ainsi appelée, parce qu'elle est affectée à la ligne dans laquelle elle se trouve ; et elle a ordinairement cette qualité, lorsqu'elle est tout à la fois graduelle et faite soit au profit de la famille, soit en faveur des descendants successivement et les uns après les autres. Dans ce cas en effet, il est de maxime constante, que la substitution une fois entrée dans une ligne, n'en sort plus qu'après l'épuisement de tous les individus qui s'y trouvent habiles à la recueillir." (1)

(1) Autorités des Demandeurs : Pothier, *Substitutions*, sec. 3, art. 1, sec. 5, art. 1, sec. 6, art. 1, sec. 7, art. 4 ; Ricard, *Substitution*, part. 1, ch. 8, nos 551, 552, 582, 676, 692 ; Bougier, lettre F, n° 30 ; Le Maître, tit. 15, p. 461 ; Thévenot D'Essaulle, p. 323, n° 987, pp. 325, 333, sec. 8, ch. 63, nos 983-87-88 ;

Loranger, à l'argument, posa la question comme suit : L'on demande si, lors de l'ouverture de la substitution, les arrière-petits-enfants issus des premiers grevés de substitution et qui forment leur descendance par plusieurs familles différentes, partageront par souches ou par têtes ? En réponse, il dit : La solution de cette question dans le sens du partage par tête, dépend des propositions suivantes : 1° De droit commun, le partage d'un legs en faveur de légataires appelés par une disposition commune se fait par têtes ; 2° la représentation fait exception à cette règle, c'est-à-dire, que, dans le cas où le prédécès d'un des légataires aurait par représentation appelé ou rapproché son héritier dans son degré, le partage se fait par souches, et c'est l'exception qu'il s'agit d'examiner ici ; 3° dans le cas actuel, le prédécès d'un des arrière-petits-enfants, n'admettrait pas par représentation ses enfants au partage avec les autres petits enfants appelés, ses oncles et tantes, lors de l'ouverture de la substitution ; 4° en thèse générale, la représentation n'avait lieu que dans les successions *ab intestat ;* elle était inconnue dans les successions testamentaires, dont les règles différaient totalement de celles qui réglaient les successions légitimes ; 5° la maxime que la représentation avait lieu en matière de substitution n'était consacrée par aucune loi et n'était pas admise dans la jurisprudence. Elle ne devait sa faveur qu'à l'opinion isolée de quelques auteurs, combattus par la masse des jurisconsultes, et, sous ce rapport, l'art. 21 de l'ordonnance de 1747 n'a pas établi un droit nouveau en abolissant la représentation ; 6° ce système de représentation en matière de substitution était même contraire au principe de la transmission, qui fait que le substitué recueille directement de la main du défunt et non de celle du grevé, qui ne favorise en rien l'appelé ; 7° elle était admise seulement dans les cas où le testateur s'en était expressément expliqué, et dans ceux où de son silence l'on inférait qu'il avait voulu prendre pour modèle de l'ordre de la succession, l'ordre établi par la loi, c'est-à-dire la loi des successions *ab intestat* ; 8° ici le silence du testateur ne pourrait faire naître cette présomption, car, dans nos successions, il n'est en aucune façon suppléé aux paroles dans lesquelles le testateur dispose de ses biens, et ce en vertu du statut de 1801, qui a établi la liberté illimitée de tester, et substitué aux maximes de la coutume les principes du droit écrit en matière de succession ; 9° cependant admettant, que la question doive être jugée comme elle l'eût été en France avant l'ordonnance de 1747, le cas actuel ne

Cujas, tit. 40 ; Dig. *Sal. ad dict. leg.* 23, t. 1, p. 2140 ; Ordon. *des Substitutions*, tit. 1, art. 22 ; Rolland de Villargues, *Substitutions prohibées*, pp. 2-3-59 ; Merlin, *Répertoire* vbo *Substitution fidei-commis*, t. 16, pp. 596, 606 ; Peregrin, *De fidei-commis*, art. 20, n° 3.

rentrerait pas dans la thèse des partisans de la représentation, dans la catégorie de ceux où ils admettraient cette représentation ; 10° ils ne l'admettraient que dans le cas où la substitution étant faite en terme collectif, soit de la famille des représentants ou descendants du testateur ou des grevés, et ici les arrière-petits-enfants sont appelés nominativement ; 11° l'intention du testateur d'exclure la représentation doit s'inférer si on juge sa disposition par inférence, parce qu'il a expressément appelé ses arrière-petits-enfants sans comprendre leurs héritiers ou descendants dans la vocation. (1) M. Joseph Lefebvre de Bellefeuille *ès-qualité*, plaida séparément. Représentant, en sa qualité de tuteur élu à la substitution, tous les appelés à cette substitution, lors de l'argument, il dit : Si, avant d'entrer dans l'examen de la question légale, l'on se demande au seul point de vue de l'équité, si un d'entre quatorze arrière-petits-enfants, appelés tous et de la même manière, ensemble, en vertu d'une seule et même disposition, peut avoir pour sa part un tiers au lieu d'un quatorzième, il semble que la réponse ne saurait être douteuse, tant une semblable prétention répugne à la lettre du testament, et tant, pour obtenir ce résultat, il faut s'écarter des indications que la disposition elle-même contient de la volonté du testateur. Quant à la question de loi, le principe qu'invoque la Demanderesse, et c'est le seul qu'elle invoque ou puisse invoquer, est, qu'en matière de fidéi-commis la représentation a lieu comme en matière de succession ; et l'application qu'en fait la Demanderesse est, qu'elle a droit à la part à laquelle avait droit son père. Mais, si la Demanderesse a raison d'invoquer le principe de la représentation, son père pouvait l'invoquer également. Représentant Nicholas Eustache Lambert Dumont, le fils aîné du testateur, le père de la Demanderesse avait droit, comme aîné, à trois sixièmes des biens du testateur et Mme Laviolette à un quart. Pourquoi alors représentant son père, la Demanderesse ne demande-t-elle pas trois-sixièmes au lieu d'un tiers ? C'est qu'elle l'a déjà demandé sans succès, par une action qu'elle a perdue. *Globensky*, vs. *Laviolette*, (4 L. C. rep., p. 384.) La Cour Supérieure et la Cour d'Appel à l'unanimité, incluant, le juge en chef, SIR JAMES STUART, quoiqu'il soit mort avant d'avoir pu pronon-

(1) Autorités des Défendeurs Elmire Dumont et Godefroi Laviolette, citées par M. Loranger : Lebrun, *Successions*, 1, 3, ch. 5, sec. 1, pp. 456-57-58 ; Code civil, art. 787 ; Pothier, *Substitutions*, t. 8, p. 481 ; Toullier, t. 4, p. 182 et suivantes ; Ricard, *Représentation*, ch. 1, n° 4 et suivant ; *Idem*, *Substitutions*, traité 3, ch. 8, sec. 2, nos 581-82, 692 ; Eusèbe de Laurière, sur l'art. 321. *De la représentation*, p. 167, n° 200 ; Merlin, *Répertoire*, tit. 2, p. 192, 206 ; *Coutume de Paris*, art. 319-20-37 ; Bourjon, *Substitutions*, t. 2, tit. 5, sec. 3, n° 12, p. 115 ; Furgole, *Commentaire sur l'ordonnance des substitutions*, tit. 1, art. 22, p. 80 ; *Parfait notaire*, t. 2, ch. 9, p. 255 ; Bouguier, sur la lettre F. n° 3.

cer son jugement, ont décidé qu'il s'agissait non d'une succession *ab intestat*, mais d'une succession testamentaire ; qu'il n'y avait aucune volonté exprimée dans le testament, de donner à la Demanderesse un droit d'aînesse, et qu'on ne pouvait, en ayant recours aux conjectures admises par certains auteurs, induire cette volonté. Et la Demanderesse a acquiescé à ce jugement. La question décidée par les deux cours est précisément la même que celle soulevée par la Demanderesse en la présente cause. Quelle anomalie, si la Demanderesse après avoir acquiescé à un jugement qui déclare que le partage ne doit pas se faire par souches, réussissait dans sa présente demande ! Le fait seul qu'elle a droit non seulement à un tiers mais à une moitié en vertu du principe qu'elle invoque, et qu'elle se contente de demander un tiers devrait suffire pour faire rejeter sa demande. N'aurait-elle pas appelé à Sa Majesté en Son Conseil Privé, si elle eût cru le jugement erroné ? Ne l'ayant pas fait, comment peut-elle, sous prétexte qu'elle demande une partie au lieu du tout, remettre en question devant les tribunaux ce que nos tribunaux ont décidé ? Le principe en vertu duquel le tout a été refusé étant précisément celui en vertu duquel une partie est aujourd'hui demandée. Le principe que la Demanderesse invoque, à savoir, que la représentation a lieu en matière de fidéi-commis est sans contredit faux : formulé d'une manière aussi générale, il est impossible à la Demanderesse de l'appuyer d'une seule autorité respectable. Dans les legs il s'agit d'une prédilection du Testateur ; si la personne qu'il a choisie ne recueille pas, le legs devient caduc ou passe aux autres légataires nommément appelés par le Testateur. C'est le principe fondamental du Droit Romain sur les dispositions testamentaires. Si, dans les successions, la représentation a été admise, c'est contrairement à la rigueur du droit, en admettant la présomption que, si celui de la succession duquel il s'agit avait eu occasion de faire un testament, il l'aurait ainsi prescrit. Mais aux volontés du Testateur telles qu'exprimées dans l'acte même, il n'est pas possible d'ajouter sans substituer à la volonté du Testateur une volonté étrangère. S'il y a eu difficulté ce n'est pas sur ce point, mais sur un autre qui s'était élevé, alors que régnait en France sur la matière des Substitutions, la confusion presqu'inextricable à laquelle l'Ordonnance de 1747 seule put mettre fin. Cette question bien différente de celle que pose la Demanderesse, était de savoir si lorsqu'au lieu d'être fait en faveur de personnes certaines et désignées par leurs noms, le fidéi-commis était fait en faveur de plusieurs désignées par un nom collectif, comme enfants, parenté, famille ou autre nom semblable, il devait y avoir lieu à la représentation entre les personnes ainsi appelées ; dans le même cas où elle aurait lieu s'il

succédait *ab intestat.* Sur ce point l'art. 21 de l'Ordonnance des Substitutions, est à l'effet suivant: "La représentation " n'aura point lieu dans les Substitutions, soit en directe ou " collatérale, et soit que ceux en faveur de qui la Substitution " aura été faite y ayant été désignés en particulier, et nom- " més suivant l'ordre de la parenté qu'ils avaient avec l'auteur " de la Substitution, le tout à moins qu'il n'ait ordonné par " une disposition expresse, que la représentation y aurait lieu, " ou que la Substitution serait déférée suivant l'ordre des suc- " cessions légitimes." Il existe deux raisons qui empêchent la Demanderesse de soulever dans la cause actuelle aucune semblable question. Les termes dont s'est servi M. Dumont s'y opposent formellement, et ils y prêteraient que la question devrait être décidée conformément à la disposition de l'Ordonnance qui a toujours été la loi en pareil cas. Les autorités ci-dessous citées établissent clairement que l'Ordonnance n'a pas introduit un droit nouveau. (1) La cour trouvera dans les auteurs cités que sur les douze Parlements auxquels le Chancelier d'Aguesseau posa la question, plusieurs, entr'autres Dijon, Grenoble, Toulouse, Pau, déclarèrent de la manière la plus énergique qu'ils n'avaient jamais sous aucune forme, admis la représentation dans les fidéi-commis, citant l'opinion du président Fabre qui traitait d'ignorants tous ceux qui prétendaient qu'elle put être admise. *Quis enim nescit jus representationis habere tantum locum in successionibus ab intestato non in substitutionibus.* Cujas, Consult. 15. D'autres reconnurent qu'ils admettaient la représentation dans les fidéi-commis; mais que leur jurisprudence était contraire à la loi et devait être abolie; par exemple, le premier président du Parlement d'Aix. (Quest. sur les Subst. Quest. 29e, p. 305.) Quant au Parlement de Paris nous avons le témoignage de Ricard, dans sa Préface, qu'il avait conservé, plus scrupuleusement que tous les autres Parlements, le véritable esprit du Droit Romain, d'où l'on peut induire qu'il n'admettait pas la représentation dans les fidei-commis. Et c'est en outre ce qui résulte des observations du Chancelier d'Aguesseau sur les questions 28e et 29e C'est dans Henrys que les textes du Droit Romain sont cités avec le plus de soin; et, dans cet au-

(1) L'Ordonnance de 1747, en prohibant la représentation dans les fidéicommis, n'a pas introduit un droit nouveau; Chabot, *Questions Transitoires*, t. II, p. 251, Vo. *Substitution;* Questions sur les Substitutions. Réponse des Parlements à la quest. 29e; Papon, *Arrêts notables des Cours Souveraines*, l. XX, tit. 3, art. 33; Maynard, *Arrêts*. liv. V, ch. 45, cité par Henrys, *loco citato*; D'Olive, *Arrêts du Parlement de Toulouse*, liv. V, ch. 23, p. 739; Boniface t. II. l. 2, l. tit. 2, ch. 7; Brodeau, sur Louet, lettre F, ch. 2; Cochin, *Œuvres*, t. IV, p. 268, cause 75e; Aymart, *Explication de l'Ordon.*, p. 60 et 61; Expilly, *Arrêts* ch. V. *Cujas Consult.* 15; Henrys, *Œuvres*, t. III, p. 109. Quest. 25e, no. 3. *Id.*, p. 112 *Observations*; Faber, *de err. praymat. decad.* 55. *err.* 3; Faber, *Codex*, p. 688, Lef. X.

teur et dans Bretonnier, son annotateur, se trouvent toutes les principales autorités qui établissent que la représentation ne peut, sous aucun prétexte, être introduite dans les fidéi-commis. Sur cette question, comme sur tant d'autres ayant rapport aux substitutions, les différents jurisconsultes en France avant l'Ordonnance, adoptaient l'affirmative ou la négative, suivant le préjugé que chacun pouvait avoir ou de la faveur des substitutions ou des inconvénients qu'elles peuvent produire. L'opinion de Pothier, à l'endroit déjà cité, est que, tout au plus, les raisons données par Ricard sont spécieuses, et le Chancelier d'Aguesseau (Quest. sur les Subst. pp. 304 et 305) montre que la difficulté de distinguer exactement les expressions collectives de nature à faire naître la présomption, que le substituant a voulu se conformer à la loi des successions *ab intestat*, sont tellement grandes qu'il vaut mieux exclure la représentation dans tous les cas, et exiger du Testateur qu'il exprime sa volonté d'une manière formelle, s'il entend se conformer à la loi des successions. Quand on considère que c'est sous ces circonstances que l'art. 21 de l'Ordonnance des Substitutions a été passée, il semble qu'il soit impossible de prétendre que l'Ordonnance des Substitutions ait introduit un Droit nouveau, et que la seule opinion correcte est, que l'Ordonnance n'a fait que proclamer d'une manière plus décisive ce qu'avaient toujours voulu la loi et la raison. Quelques auteurs qui ont écrit subséquemment à l'Ordonnance, comme Thevenot d'Essaule, Furgole, contiennent, il est vrai, des passages de nature à induire en erreur sur ce point, ceux qui n'examineraient pas attentivement l'état de la question antérieurement à l'Ordonnance; mais ces auteurs s'expriment incidemment sans se piquer d'être bien exacts, et sans songer à l'usage qu'on ferait, dans des pays auxquels l'Ordonnance ne devait pas s'étendre, d'une expression trop générale. Ne pensant qu'à dénoncer les désordres que l'Ordonnance avait eu pour but de faire cesser, ils étaient naturellement exposés à exagérer la gravité ou l'universalité de ces désordres. (Furgole, *Com. sur les Subs.*, pp. 91 et 108.) Et Thevenot d'Essaule, chap. 12, s'exprime d'une manière non moins générale lorsqu'il montre comment, avec des conjectures, on avait admis la représentation dans tous les fidei-commis et donné à la condition, l'effet de la disposition. " C'était, ajoute-t-il, porter la licence des conjec-" tures plus loin que le Droit Romain, où les enfants mis dans " la condition n'étaient pas censés appelés et où la représen-" tation était inconnue dans les fidéi-commis." Il semble que ce n'est pas au moyen de semblables passages que la Demanderesse pourrait réussir à établir que la jurisprudence en France antérieurement à l'Ordonnance, dans aucun Parlement donné, et notamment dans le Parlement de Paris, était favorable à

ses prétentions. Et, supposant même qu'on pourrait citer quelqu'arrêt isolé pour établir que le Parlement de Paris avait adopté le sentiment de Ricard, cependant nos cours ayant la preuve devant elles que ce sentiment est erroné et contraire au Droit Romain, ne seraient nullement tenues de s'y conformer. En second lieu, les termes dont s'est servi M. Dumont ne permettent pas à la Demanderesse de soulever la question. Si M. Dumont eût appelé sa famille à la substitution et étendu la disposition à tous les degrés permis par la loi ; ou s'il eût appelé ses descendants en nom collectif et déclaré que la substitution serait graduelle ; ou encore, s'il eût appelé ses enfants à charge de substitution en faveur de leurs descendants aussi loin que la substitution pourrait s'étendre, la question se serait présentée. Mais, dans le cas actuel, il y a vocation spéciale des enfants, vocation spéciale des petits-enfants, et vocation spéciale des arrière-petits-enfants. Pour prendre les petits-enfants, dans le cas actuel, n'avaient pas besoin du secours de la représentation, et les arrière-petits-enfants n'en ont pas besoin non plus. Les arrière-petits-enfants viennent à la substitution, non parce qu'ils sont compris sous le terme collectif d'enfants ou de petits-enfants ; mais parce qu'ils sont appelés nommément en leur qualité d'arrière-petits-enfants. Le droit de représentation qu'invoque la Demanderesse est un droit qu'il n'est pas possible de concevoir, car ce n'est pas la part de son père à laquelle elle a droit, mais la part que le Testament lui donne à elle-même ; et elle a droit à sa part en toute propriété à l'ouverture de la substitution en faveur des arrière-petits-enfants, pendant que son père n'avait droit à la sienne qu'à charge de substitution. En outre, si l'on cherche à appliquer le raisonnement de Ricard, quant à une volonté du Testateur d'introduire la représentation, on se trouve arrêté par des difficultés insurmontables. L'appelé *capit a gravante non a gravato.* Tous les arrière-petits-enfants tiennent donc du Testateur : or plusieurs légataires appelés conjointement partagent également. *Si partes non sunt adjectæ æquæ servantur.* La Demanderesse ici prend de son chef, comme légataire appelée en sa qualité d'arrière-petite enfant ; prenant de son chef, il est de règle qu'elle prenne par tête. Le partage par souches n'étant possible que là où il y a représentation, l'effet de la représentation étant de donner à toute une souche la part que celui que cette souche représente, aurait eue. La Demanderesse a renoncé à la succession de son père, et ce dernier avait renoncé à la succession du fils du Testateur. Sous ces circonstances, la représentation est impossible. On ne vient jamais par représentation de ceux qui ont renoncé. Si, au lieu d'une succession testamentaire, il s'agissait d'une succession légitime, tous les arrière-petits-enfants venant de leur

chef, le partage se ferait par têtes. (1) On a pu voir par ce rapport que les questions de droit suivantes ont été soulevées dans la discussion de la cause. 1o. La représentation est-elle admise dans les fidéi-commis? 2o. L'ordonnance de 1747 a-t-elle introduit un droit nouveau en abolissant la représentation dans les fidéi-commis? 3o. Peut-on représenter ceux qui ont renoncé? La Cour n'a pas décidé ces questions; elle s'est contentée de déclarer la Demanderesse propriétaire de la partie des biens qu'elle réclamait, et cela *en vertu du testament.* Voici le texte du jugement: "La Cour, faisant droit sur les conclusions de la Demanderesse, Virginie Dumont déclare la Demanderesse, Virginie Dumont, être, en son nom et droit, propriétaire en pleine propriété en vertu du Testament de Louis Eustache Lambert Dumont, de la substitution y contenue et du partage d'une moitié indivise dans les susdits biens. Et ordonne et adjuge que, sous un mois de délai de la date de la signification du présent jugement, les Défendeurs, ès-qualité, soient tenus de convenir d'experts avec la Demanderesse pour faire ou établir le lot ou la part et portion pour moitié qui appartiendra définitivement à la Demanderesse d'une part, et aux Défendeurs, tant en leurs propres noms qu'en leurs qualités de l'autre dans les dits biens, sinon que les experts soient nommés d'office par cette Cour ou l'un des juges d'icelle, et que, dans le cas où par le rapport d'Experts il serait constaté que les biens ne peuvent commodément être partagés suivant les droits de la Demanderesse et des Défendeurs, tant en leurs propres noms qu'en leurs qualités, qu'ils soient en ce cas vendus par licitation en la manière ordinaire et prescrite par la loi, au plus offrant et dernier enchérisseur, pour être le prix de la vente payé et distribué à la Demanderesse et aux Défendeurs par moitié, le tout avec dépens contre les Défendeurs, c'est-à-dire, contre la Défenderesse Laviolette, Elmire Dumont, en son propre nom, et contre les deux Défendeurs Laviolette et De Bellefeuille, ès-qualité qu'ils ont été poursuivis." (7 J., p. 12.)

R. et G. LAFLAMME, pour Demandeurs.

Hon. LORANGER, C. R., pour Défenderesse ELMIRE DUMONT.

JOS. LORANGER, pour Défendeur GODEFROI LAVIOLETTE, ès-qualité.

RYAN et DEBELLEFEUILLE, pour Défendeur J. L. de BELLEFEUILLE, èsqualité.

EDM. BARNARD, Conseil.

(1) Guiné, Traité de la Représentation, p. 169; Pothier, Succ. ch. II, Sect. I II, p. I, citant Cujas: "*Jus repræsentationis hanc vim tantam habet ut remotior cum propiore concurrat non ut propiorem prorsus excludat.*" Basnage, sur l'art. 304 de la Cout. de Normandie; Demolombe, t. XIII, p. 529; Pothier, *Suc.* ch. II, Sect. I, art. I, p. 3, sur la question, les enfants d'un fils prédécédé excluent-ils les enfants d'un autre fils vivant lequel est exhérédé

INTERROGATOIRES SUR FAITS ET ARTICLES.

SUPERIOR COURT, Montreal, 6th February, 1863.

ENQUETE SITTINGS.

Coram MONK, J.

FENN *vs.* BOWKER.

FAITS ET ARTICLES—ANSWERS *Viva voce.*

Held: That a party in the cause who has been ordered to answer interrogatories *sur faits et articles viva voce*, under 20 Vic. C. 44 S. 86, *may* read his answers from a paper previously prepared. (1)

In this case, Defendant appeared at the *Enquête* sittings to answer *viva voce* to interrogatories previously served upon him in the terms of 20 Vic. C. 44 S. 86, and, in answering, he made use of a paper on which he had previously written his answers. SNOWDON, for Plaintiff, objected to Defendant making use of the paper in giving his answers as opposed to the terms of the statute and the invariable practice of the Court, referring to the decision in *Moss* vs. *Douglas*, No. 1053, S. C. 4th May, 1859. ROBERTSON, for Defendant, contended that there was no positive enactment prohibiting the use of written memoranda; which view the Court adopted, overruling the objection. (7 J., p. 28.)

SNOWDON and GAIRDNER, for Plaintiff.

A. and W. ROBERTSON, for Defendant.

(1) Dans la cause de *Coleman et al.* vs. *Fairbairn*, C. S., Montréal, 4 mars 1859, BADGLEY, J., 8 *R. J. R. Q.*, p. 131, il a été jugé qu'une partie à qui il a été ordonné de répondre de *vive voix* aux interrogatoires sur faits et articles qui lui sont adressés conformément aux dispositions de la sec. 86 du ch. 44 du statut du Canada 20 Vict., ne peut lire ses réponses sur un papier préparé à l'avance. V. art. 226 C. P. C.

TABLE ALPHABÉTIQUE

—DES—

MATIÈRES CONTENUES DANS CE VOLUME.

A

ABORDAGE. Dans le cas d'un abordage entre deux vaisseaux, si la cause de l'accident n'est pas clairement établie, celui qui éprouve des dommages ne pourra les recouvrer s'il est constaté que dans le temps, il ne suivait pas les règles de la navigation..... 89

ACTE DES LICENCES :—*Vide* CERTIORARI.

ACTION EN PARTAGE. Une demande en licitation contient toujours une demande en partage..... 145

ACTION EN PARTAGE :—*Vide* ACTION PÉTITOIRE.

ACTION HYPOTHECAIRE :—*Vide* CAUTIONNEMENT EN APPEL.

ACTION PAULIENNE :—*Vide* FRAUDE.

ACTION PETITOIRE. L'action ne doit pas être portée contre le voisin, s'il n'y a pas eu de bornage..... 461

ACTION PETITOIRE :—*Vide* PRESCRIPTION TRENTENAIRE.

ACTION POSSESSOIRE. N'a pas lieu pour les meubles. Il doit toujours être question de la propriété dans les actions relatives aux meubles..... 423

AFFRETEMENT. L'affrêteur peut revendiquer les effets mis à bord du vaisseau, si le maître de ce vaisseau refuse de signer un connaissement..... 351

" Le maître du vaisseau doit procéder à son voyage sans déviation inutile, mais il peut secourir les vaisseaux en détresse..... 433

AMENDEMENT A UN RETOUR D'HUISSIER. L'huissier ne peut demander par motion la permission d'amender son retour. Cette demande doit être faite par la partie..... 269

APPEL. La cour peut prolonger les délais pour donner le cautionnement en appel..... 471

" La procédure sur un appel sera suspendue jusqu'à ce que l'Appelant ait payé les frais d'un premier appel renvoyé..... 469 et 470

" Lorsque la cour a accordé la permission d'appeler d'un jugement interlocutoire, si l'Appelant ne procède pas, cette permission sera révoquée..... 422

" On ne peut, par un seul appel, se pourvoir contre le jugement principal et contre un jugement sur une opposition à jugement et sur une opposition à la saisie..... 23

" Peut être interjeté d'un jugement rendu en vacance par un juge ordonnant la libération d'un Défendeur arrêté sur capias..... 69

" :—*Vide* CAUTIONNEMENT EN APPEL D'UN JUGEMENT DE LA COUR DE CIRCUIT

ARBITRAGE. La cour ne peut référer une cause ordinaire à des arbitres sans le consentement des parties..... 474
ARTICULATION DE FAITS :—*Vide* CONTESTATION LIÉE.
ASSIGNATION. Un bref adressé à un huissier du Bas-Canada, ne sera pas nul, quoiqu'il doive être signifié en Haut-Canada par une personne lettrée..... 341
ASSURANCE. Dans le cas d'une assurance en bloc sur des marchandises appartenant à plusieurs individus, endommagées par l'inondation et subséquemment détruites par le feu, chacun des intéressés doit contribuer dans la réduction faite sur le montant de l'assurance à raison de la perte causée par l'eau, si on ne peut constater à qui appartenait les marchandises endommagées par l'eau..... 96

B

BILLET PROMISSOIRE. Le montant d'un billet portant une condition résolutoire, ne peut être réclamé si la condition est remplie..... 344
" " Le signataire d'un billet promissoire peut opposer aux porteur prête-nom tous les moyens qu'il aurait pu faire valoir contre le véritable créancier..... 124
" " :—*Vide* PRESCRIPTION.
" " " PREUVE.

C

CAPIAS. Dans le cas d'un capias émané après jugement, le Demandeur doit prouver que le Défendeur était sur le point de laisser la province avec l'intention de frauder..... 59
" Un mineur commerçant peut être arrêté sur capias pour une dette de son commerce..... 88
" :—*Vide* APPEL.
CAUSE SOMMAIRE :—*Vide* PROCÉDURE.
CAUTIONNEMENT " APPEL.
" EN APPEL d'un jugement de la Cour de Circuit. Doit contenir une désignation des propriétés immobilières..... 458
" EN APPEL. Les cautions d'un Défendeur poursuivi en déclaration d'hypothèque sont tenus de payer la dette quoique le Défendeur ait l'option de délaisser..... 327
" POUR FRAIS. Le Demandeur doit donner avis au Défendeur qu'il a fourni le cautionnement pour frais..... 333
" POUR FRAIS. Lorsqu'il y a plusieurs Défendeurs, chacun d'eux a droit à un cautionnement pour frais, mais les mêmes cautions peuvent suffire..... 339
CERTIORARI. Une conviction à une pénalité moindre que celle indiquée par le statut est illégale..... 490
CESSION DE BIENS. Une cession de biens ne sera pas annulée à la poursuite des créanciers, s'il n'est pas prouvé qu'elle est faite en fraude de leurs droits..... 128
CHEMIN DE FER :—*Vide* RESPONSABILITÉ.

CHOSE JUGEE. Peut être plaidée à l'encontre du cessionnaire d'un jugement 400
CLAUSE RESOLUTOIRE. Le vendeur, qui veut se prévaloir de la clause résolutoire. doit avec sa demande indiquer ce qui a été payé sur le prix 104
" RESOLUTOIRE :—*Vide* VENTE.
COMMUNAUTE DE BIENS. La renonciation par la femme à la communauté à l'effet de la décharger d'uneobligation par elle consentie comme caution de son mari 321
COMPENSATION. Dans une action portée par l'héritier d'un débiteur insolvable, pour le recouvrement d'une dette contractée avec ses exécuteurs, une dette due par le défunt au Défendeur peut être offerte en compensation 61
" Le Défendeur poursuivi pour des dommages non liquidés ne peut opposer en compensation une dette liquidée 338
COMPETENCE. La cour de circuit a juridiction pour entendre une demande pour gages faite par un matelot étranger contre le capitaine du vaisseau 64
" Les tribunaux du pays sont compétents pour juger une poursuite pour gages d'un matelot étranger contre le maître de son vaisseau 449
" On ne peut assigner une société en nom collectif dans un district où le droit d'action n'a pas pris naissance et où les Défendeurs ne résident pas.. 275
" On ne peut, sous l'acte des locataires et locateurs, procéder dans une poursuite pour la réclamation du loyer de meubles 30
" Plusieurs héritiers peuvent être assignés dans le district où l'un d'eux a son domicile pour une dette de la succession 268
" Quoique le domicile du Défendeur soit en dehors du district où l'émanation de la saisie-arrêt avant jugement a eu lieu et que le Défendeur n'y ait pas été assigné, les faits de fraude, qui lui sont imputés comme ayant eu lieu dans un district étranger, sont attributifs de juridiction 317
COMPROMIS. Le compromis ne comprend pas nécessairement l'abandon d'un droit, mais il existe pour l'abandon d'une prétention 182
" Lorsque les parties à une poursuite règlent à condition que le Défendeur paie les frais, le Demandeur ne peut rapporter son action pour les dépens seulement. La demande de distraction faite par l'avocat n'empêche pas la partie de compromettre 264
CONTESTATION DE COLLOCATION :—*Vide* DÉPENS.
" D'OPPOSITION. Un Opposant qui conteste l'opposition d'un autre opposant n'est pas tenu d'alléguer dans sa contestation qu'il est créancier 165
" LIEE. Il ne doit y avoir qu'une contestation au mérite entre les parties et une seule articulation de faits 467
CONTRAT DE MARIAGE. La clause, dans un contrat de mariage, par laquelle le futur époux donne à la future une somme d'argent avec hypothèque sur les propriétés du futur époux, empêche ce dernier de disposer de l'immeuble hypothéqué, quoique par le contrat il se soit réservé le droit d'en disposer 367
" DE MARIAGE :—*Vide* FRAUDE.

CORPORATION MUNICIPALE. Doit poursuivre en son nom et ne peut poursuivre au nom du conseil..... 90
" MUNICIPALE. Est responsable des dommages résultant de l'encombrement d'une rue, au-delà de la moitié de son étendue, par des matériaux de construction..... 319
" MUNICIPALE. Une corporation municipale a droit de recouvrer un *quantum meruit* pour l'eau fournie aux contribuables..... 362
COUR DES COMMISSAIRES. A juridiction pour le recouvrement de la balance d'une somme excédant $25, pourvu que cette balance n'excède pas $25..... 263
CUMUL D'ACTIONS. On ne peut joindre dans une même demande une action pétitoire, une action pour faire remplir une excavation et une action qu'un passage est trop haut... 461

D

DECLARATION. Dans une action contre une femme mariée autorisée par son mari, l'allégué " que les Défendeurs sont obligés " n'est pas une illégalité fatale..... 271
DECRET. Les frais de vente d'immeubles par le shérif sont répartis au *pro ratâ* du prix de vente..... 107
" :—*Vide* SHÉRIF.
DELAI. Dans une action contre la cité de Montréal pour dommages causés dans une émeute, les intérêts doivent être accordés du jour de la demande..... 267
DELEGATION. La délégation devient parfaite par l'enregistrement de l'acte qui le comporte..... 105
DEMANDE INCIDENTE. La demande incidente d'un Demandeur doit être signifiée au Défendeur..... 177
DEPENS. Dans une action portée par un corps qui n'est pas légalement incorporé, il n'y aura pas de condamnation aux dépens contre cette corporation sur infirmation du jugement dont était appel..... 90
" La cour n'accorde pas de dépens contre un officier public qui poursuit en cette qualité..... 493
" Lorsqu'une partie a plusieurs recours qu'elle peut exercer avec mêmes effets, s'il exerce le plus dispendieux, il n'aura que les frais du recours le moins dispendieux.... 333
" On ne peut obtenir en appel, par motion, la distraction des dépens encourus en Cour Inférieure..... 113
" Sur contestation du certificat du régistrateur, la partie colloquée par le protonotaire sera condamnée aux frais de la contestation, si elle ne produit pas une décharge pour le montant colloqué..... 4
" Une demande peut être rapportée pour les dépens seulement..... 351
" :—*Vide* APPEL.
" " COMPROMIS.
" " DECRET.
DISTRACTION DE FRAIS :—*Vide* DEPENS.
DOMMAGES :—*Vide* ABORDAGE.

E

ELECTION DE MARGUILLIER. La mise en nomination doit se faire distinctement par une proposition, et le désir exprimé de voir élire un individu marguillier ne suffit pas pour le mettre en nomination..... 171

ELECTION MUNICIPALE. Quoique deux élections de conseillers de ville aient eu lieu le même jour, l'une pour remplir une vacance ordinaire, l'autre causée par la résignation d'un membre du conseil, le candidat ayant le moins de votes devra remplir la vacance ordinaire et rester en office pour la période la plus longue, s'il a été nommé pour remplir cette vacance..... 115

ENREGISTREMENT. L'enregistrement d'une hypothèque moins de dix jours avant la banqueroute est nul. 407

" :—*Vide* DELEGATION.

F

FAITS ET ARTICLES. La partie à qui il est ordonné de répondre *virâ voce* à des interrogatoires sur faits et articles peut lire ses réponses sur un papier préparé à l'avance..... 512

FEMME MARIEE. Le mari qui fait commerce au nom de sa femme, qui est son prête-nom, l'oblige pour les fins de son commerce..... 472

" MARIEE :—*Vide* MANDAT.

" " " MARIAGE.

" SEPAREE DE BIENS. La femme séparée de biens ne peut affecter ses propriétés immobilières pour une dette due par son mari..... 5

FRAUDE. La donation, faite par le futur époux insolvable à la future épouse dans le contrat de mariage, peut être annulée à la demande d'un créancier..... 3

" La vente d'effets saisis, faite à un prête-nom du saisi et payée de ses deniers, sera annulée..... 214

" Le transport d'un marché par le constructeur d'un édifice ne sera pas annulé pour fraude, mais le cessionnaire pourra être forcé de payer le surplus de la valeur des ouvrages à faire..... 119

" Une vente faite par un fils à son père qui est sans moyen sera présumée frauduleuse et annulée, même s'il est prouvé que les espèces ont été comptées..... 480

" Une vente judiciaire, faite sur saisie, sera annulée s'il est prouvé qu'elle a été faite en fraude des droits des créanciers..... 336

G

GAGES DES MATELOTS ETRANGERS. Dans l'action d'un matelot étranger pour gages contre le capitaine du vaisseau, le témoignage du capitaine sera reçu quant à la validité de l'engagement et la nature de cet engagement..... 447

" DES MATELOTS ETRANGERS :—*Vide* COMPETENCE.

GARDIEN. Le gardien à une saisie mobilière peut s'opposer à une seconde saisie des mêmes effets..... 1

" Un individu, constitué le gardien à une saisie n'est tenu de représenter les effets mis sous sa garde qu'à la personne de qui il tient sa charge..... 213

" :—*Vide* SAISIE-ARRÊT AVANT JUGEMENT.

GREFFIER DES APPELS. Les honoraires du greffier des appels appartiennent à la couronne qui seule a droit d'en poursuivre le recouvrement..... 393

H

HONORAIRES:—*Vide* PROTONOTAIRE.
HYPOTHÈQUE GENERALE. Une hypothèque créée avant l'ordonnance d'enregistrement affecte les propriétés acquises depuis par le débiteur..... 367

I

IMPUTATION DE PAIEMENT. Doit être faite préférablement sur la créance qui est cautionnée et qui porte intérêt..... 124
INJURE. Dire d'un pilote qu'il a été payé pour jeter un vaisseau à la côte et le détruire constitue une injure grave..... 95
INSCRIPTION DE FAUX. Le fait que le deuxième notaire n'aurait pas signé l'acte lorsqu'il aurait été reçu ne constitue pas un faux..... 278
INTERPRETATION D'ACTE. L'obligation dans un contrat de vente de mines de payer au vendeur la 10e partie des profits nets de la mine comprend les profits par un locataire de l'acquéreur.....303 et 311

J

JUGEMENT :—*Vide* VENTE DE CRÉANCE.
" DE DISTRIBUTION. Le protonotaire en préparant un jugement de distribution doit le préparer conformément aux droits apparents des Opposants, et, si le rapport est préparé conformément à ces droits, la contestation doit se faire des oppositions et non du rapport ; mais s'il fait erreur, la contestation se fait alors du rapport..... 347
" INTERLOCUTOIRE :—*Vide* APPEL.
JURIDICTION :—*Vide* COMPÉTENCE.

L

LIBELLE DANS UN PLAIDOYER. L'allégation de fraude dans un plaidoyer ne peut soutenir une action d'injure, à moins qu'on allègue que le plaidoyer n'a été produit que dans le but d'injurier..... 102
LICENCE :—*Vide* PROCÉDURE.
LICITATION. Dans une action en licitation intentée par le propriétaire indivis de la moitié d'un immeuble contre les deux propriétaires indivis de l'autre moitié, les experts doivent faire rapport si l'immeuble peut être divisé en deux parties..... 155
" :—*Vide* ACTION EN PARTAGE.
" FORCEE :—*Vide* RENTE CONSTITUÉE.
LITISPENDANCE. Dans une action pour vente par licitation, basée sur une action en partage et en licitation, la litispendance existe de la date de la signification du bref..... 145
LOCATEURS ET LOCATAIRES :—*Vide* COMPÉTENCE.
" " " " PROCÉDURE.
LOUAGE. Il n'y a lieu à la tacite reconduction pour louage de meubles que lorsque le locateur fait commerce de louage de meubles..... 214

M

MANDAT. Le mandant est obligé au paiement d'une obligation contractée par son mandataire, quoique ce dernier ait donné ses billets pour cette obligation, si ces billets ne sont pas payés..... 340
" Le mari, procureur général de sa femme séparée de biens qui fait commerce, est censé agir pour elle, lorsqu'il se qualifie d'agent dans les actes de ce commerce..... 166
" :—*Vide* FEMME MARIÉE.
MARIAGE. Lorsque des épiceries sont achetées par le mari pour la famille, la femme en est responsable..... 343
MATELOT ETRANGER :—*Vide* COMPÉTENCE.
MEUBLES :—*Vide* ACTION POSSESSOIRE.
MINEUR :—*Vide* CAPIAS.
MUR MITOYEN. La mitoyenneté entre propriétés contiguës est une présomption de droit qui impose à celui qui y objecte la nécessité de la repousser..... 71

N

NAVIGATION :—*Vide* AFFRÊTEMENT.
NOVATION :—*Vide* MANDAT.

O

OFFICIER PUBLIC :—*Vide* DÉPENS.
OPPOSITION :—*Vide* GARDIEN.
OPPOSITION A FIN DE DISTRAIRE. Basée sur ce que les effets saisis forment partie des outils du Défendeur n'est pas suffisante..... 329
" " " Si les parties ont déclaré qu'elles entendent contester l'opposition, mais ne l'ont pas fait, l'opposant doit prouver son opposition et il ne peut obtenir jugement sans preuve..... 437
" A JUGEMENT. Un Défendeur peut produire une opposition à un jugement rendu contre lui en vacance après le retour du premier bref d'exécution, s'il n'appert par le rapport de l'huissier à ce bref qu'un jour ait été fixé pour la vente des effets saisis..... 113
" EN COUR DE CIRCUIT. Il n'est pas nécessaire de l'enregistrer au greffe..... 272

P

PILOTE :—*Vide* INJURE.
POSSESSION :—*Vide* PRESCRIPTION TRENTENAIRE.
PRESCRIPTION. Pour établir la prescription trentenaire, la possession doit être non interrompue, publique et à titre de propriétaire..... 36
" Un billet notarié en brevet et à ordre n'est pas sujet à la prescription de cinq ans..... 221 et 222
" TRENTENAIRE. Dans une défense à une action pétitoire, basée sur la possession du Défen-

deur et de ses auteurs, les noms des auteurs doivent être indiqués..... 323
PREUVE. Le tribunal ne peut forcer le secrétaire provincial à produire certains documents dont la production serait nuisible à l'intérêt public..... 240
" Les conditions d'une vente sont présumées toutes contenues dans l'acte de vente, et on ne peut prouver des obligations antérieures qui ne sont pas contenues dans l'acte..... 331
" On peut prouver par témoin la promesse de payer un billet promissoire faite par l'endosseur, après qu'il est libéré par le défaut du protêt du billet..... 328
" :—*Vide* OPPOSITION A FIN DE DISTRAIRE.
PRIVILÈGE DE LA COURONNE. La Couronne est privilégiée sur les biens meubles du débiteur insolvable pour un droit de fisc..... 109
" DU BAILLEUR. Le bailleur a privilège sur les effets de son locataire pour tout le montant de son loyer, quand la sous-location est faite de tous les lieux loués..... 401
" DU VENDEUR :—*Vide* SAISIE-REVENDICATION.
PROCÉDURE. Dans une poursuite pour vente de liqueurs sans licence, il n'est pas nécessaire d'alléguer que le Défendeur n'était pas un distillateur, et l'allégué que le Défendeur a vendu un jour déterminé et en d'autres temps avant et après ne réfère qu'à une offense, le juge de paix a droit de condamner aux frais sur le maintien ou le renvoi de la poursuite.. 484
" La clause 64 du ch. 83 des S. R. B. C., qui permet la signification de règle, etc, au bureau du protonotaire, ne s'applique pas au cas d'un Défendeur absent appelé par les journaux, qui n'a pas comparu..... 465
" :—*Vide* CONTESTATION LIÉE
" :— " LIBELLE DANS UN PLAIDOYER.
" :— " PRESCRIPTION TRENTENAIRE.
" :— " SAISIE ARRÊT AVANT JUGEMENT.
" SOMMAIRE. Une action pour loyer seulement ne tombe pas sous l'acte des locateurs et locataires... 23
PROHIBITION D'ALIÉNER. Dans un acte de donation onéreuse le donateur peut stipuler la prohibition d'aliéner et a droit de reprendre l'immeuble au cas de contravention..... 391
" " Pour un temps déterminé est légale.. 372
PROTONOTAIRE. Le député-protonotaire peut, en vacance, rendre jugement par défaut..... 23
" Le protonotaire n'a droit de recevoir que les cautionnements..... 405
" Le protonotaire n'a pas le droit d'exiger le paiement de ses honoraires avant de rendre les services..... 95

R

RATIFICATION DE TITRE. Une partie ne peut intervenir dans cette procédure pour produire des quittances d'hypothèques constatées par le certificat du registrateur..... 119
RENTE CONSTITUÉE. Si une licitation forcée est conduite de manière à ne porter atteinte à aucun des droits du

crédit rentier, il ne lui sera pas permis de réclamer le capital de la rente..... 16
RESOLUTION DE VENTE :—*Vide* VENTE.
RESPONSABILITE. Une compagnie de chemin de fer n'est responsable des dommages causés par ses convois que s'il y a preuve de négligence de sa part..... 476
" :—*Vide* CORPORATION MUNICIPALE.
RESTITUTION D'IMMEUBLES. Un juge de paix, hors de session, ne peut, sur une accusation pour entrée et détention par force, octroyer la restitution d'un immeuble..... 151
RIVIÈRE. Le public a droit à tous les avantages, propres à des fins publiques, que l'état d'une rivière offre..... 191
" Un *bôme* placé sur une rivière est une nuisance publique que toute personne peut enlever..... 394

S

SAISIE-ARRÊT AVANT JUGEMENT. L'affidavit pour obtenir le bref doit être conforme aux termes mêmes de la loi. La nomination du Demandeur comme gardien n'a pas l'effet d'annuler la saisie..... 465
" " AVANT JUGEMENT. L'omission des mots "devant nous" dans le jurat de l'affidavit est une cause de nullité de l'affidavit..... 233
" " AVANT JUGEMENT. L'omission des mots "perdra sa dette" dans l'affidavit, n'est pas fatale. Sur une demande pour casser saisie arrêt, on ne doit prendre en considération que les raisons alléguées dans la requête..... 464
" " AVANT JUGEMENT. Peut être contestée par exception à la forme, indépendamment de la contestation qui peut se faire de la demande..... 77
" " AVANT JUGEMENT. Un affidavit, déclarant que sans l'émanation d'un bref de saisie, le Défendeur pourra perdre sa dette et éprouver des dommages, est suffisant..... 235
" " AVANT JUGEMENT :—*Vide* COMPÉTENCE.
" EXECUTION :—*Vide* FRAUDE.
" " " GARDIEN.
" REVENDICATION. Des meubles légalement saisis peuvent être saisis-revendiqués..... 398
" REVENDICATION. La saisie-revendication par le vendeur, en vertu de l'article 177 de la *Coutume de Paris*, ne peut être pratiquée sans affidavit..... 67
" REVENDICATION :—*Vide* GARDIEN.
SEPARATION DE BIENS. Un jugement en séparation de biens peut être rendu entre deux parties mariées dans le Haut-Canada; quoiqu'il n'y existe pas de communauté de biens. 330
SHERIF. Le shérif a droit à sa commission sur toute vente de propriétés, soit qu'il reçoive le prix, ou qu'un cautionnement soit donné..... 13
SIGNIFICATION DE PIECES DE PROCEDURE :—*Vide* PROCÉDURE.
" DU MOT "BANQUEROUTE"..... 407
SUBSTITUTION. Dans une substitution fidéi-commissaire faite en termes collectifs, les biens se partagent par souche. Lorsque la substitution s'ouvre en faveur d'un des appelés avant de s'ouvrir pour les autres, cet appelé peut immédiatement demander le partage..... 495

T

TACITE RECONDUCTION :—*Vide* LOUAGE.
TARIF DES AVOCATS. Il ne sera accordé aucun honoraire pour réaudition, à moins que cette réaudition n'ait lieu par ordre de la cour..... 150
TAXES MUNICIPALES. Les taxes municipales doivent être imposées également sur tous les contribuables..... 398
TRANSACTION :—*Vide* COMPROMIS.

U

USUFRUIT. La construction d'une maison sur une propriété sujette à un usufruit ne cause pas un changement suffisant pour mettre fin à cet usufruit..... 5

V

VENTE. Dans le cas d'une vente de plusieurs lots en bloc, à défaut de livraison d'un lot, l'acquéreur a droit à une diminution du prix équivalant à la valeur du lot qui n'a pas été livré..... 414
" De droit commun, l'action en résolution faute de paiement du prix, appartient au vendeur, soit que la vente ait été faite à terme ou sans terme, et il peut l'exercer contre le deuxième acquéreur..... 391
" La rétrocession, faite par l'acquéreur au vendeur en vertu d'une clause résolutoire du contrat de vente, n'est pas considérée comme une nouvelle vente ; mais cet acte a l'effet de rendre nulles les hypothèques consenties sur l'immeuble par l'acquéreur..... 383
" L'article 176 de la *Coutume de Paris*, qui permet au vendeur de poursuivre sa chose pour être payé du prix qu'il l'a vendue, n'a rapport qu'aux choses mobilières ; mais, dans la vente d'immeubles, le vendeur a droit à la résolution de la vente, s'il n'est pas payé..... 105
" Le vendeur a trente ans pour faire résilier l'acte de vente, faute de paiement du prix, et les fruits et revenus de la propriété doivent être compensés par toute somme payée au vendeur..... 459
" Le vendeur de marchandises qui ne sont pas conformes aux échantillons, est tenu de les reprendre à ses frais.... 451
" Si, dans un acte de vente d'immeuble, la description de l'immeuble y est ambiguë, et que les bornes soient douteuses et susceptibles de deux interprétations, on devra prendre l'interprétation qui indique une quantité conforme à celle mentionnée dans l'acte..... 36
" :—*Vide* FRAUDE.
" " PREUVE.
" " SAISIE-REVENDICATION.
" DE BOISSON SANS LICENCE :—*Vide* PROCÉDURE.
" DE CREANCE. La connaissance de la vente d'une créance acquise indirectement par le débiteur équivaut à une signification du transport..... 111
" DE CREANCE. Un jugement peut être transporté et le cessionnaire peut l'exécuter..... 322

VENTE D'IMMEUBLE, par une corporation municipale. Le propriétaire en possession d'un immeuble vendu par une corporation municipale peut poursuivre par une action possessoire l'adjudicataire qui vient le troubler dans sa possession..... 208

STATUTS IMPÉRIAUX.

ANNÉE. PAGES.
1705, 4 Anne, ch. 16, sec. 11..... 234
1774, George III, ch. 83, sec. 8..... 242

ORDONNANCES

DU GOUVERNEUR ET DU CONSEIL LEGISLATIF DE LA PROVINCE DE QUEBEC.

ANNÉE. PAGES.
1785, 25 George III, ch. 2..... 442
1785, 25 George III, ch. 2, sec. 10..... 77
1785, 25 George III, ch. 2, sec. 35..... 15
1787, 27 George III, ch. 4, sec. 10..... 79 et 235

ORDONNANCES DU CONSEIL SPÉCIAL.

ANNÉE. PAGES.
1841, 4 Victoria..... 105

STATUTS DU CANADA.

ANNÉE. PAGES.
1841, 4 Victoria, ch. 30..... 392 et 407
1842, 6 Victoria, ch. 17..... 395
1843, 7 Victoria, ch. 22, sec. 6..... 107 et 392
1849, 12 Victoria, ch. 30..... 396
1849, 12 Victoria, ch. 38, sec. 25..... 443
1849, 12 Victoria, ch. 42, sec. 2..... 69
1851, 14 et 15 Victoria, ch. 100..... 494
1851, 14 et 15 Victoria, ch. 102..... 394
1851, 14 et 15 Victoria, ch. 128, sec. 58..... 267
1853, 16 Victoria, ch. 191..... 394
1854, 18 Victoria, ch. 97, sec. 2..... 493

Année.		Pages.
1854,	18 Victoria, ch. 108, sec. 11	32
1855,	18 Victoria, ch. 100, sec. 10	91
1855,	18 Victoria, ch. 159	116
1856,	19 et 20 Victoria, ch. 55, sec. 3	28
1856,	19 et 20 Victoria, ch. 101, sec. 25	210
1857,	20 Victoria, ch. 41, sec. 5 et 12	210
1857,	20 Victoria, ch. 44, sec. 86	512
1857,	20 Victoria, ch. 44, sec. 134	30
1857,	20 Victoria, ch. 44, sec. 136	29
1857,	20 Victoria, ch. 82, sec. 7	33
1858,	22 Victoria, ch. 5, sec. 11 et 13	28
1858,	22 Victoria, ch. 5, sec. 58	32
1858,	22 Victoria, ch. 39	92
1860,	23 Victoria, ch. 57, sec. 43 et 47	29
1860,	23 Victoria, ch. 61	211
1860,	23 Victoria, ch. 67, sec. 4	171
1862,	25 Victoria, ch. 11, sec. 5	119
1890,	53 Victoria, ch. 33, sec. 36 et 88	124

STATUTS DE LA PROVINCE DE QUÉBEC.

Année.		Pages.
1892.	55 et 56 Victoria, ch. 41	13

STATUTS REFONDUS DU BAS-CANADA DE 1861.

	Pages.
Chapitre 5, sec. 6, s.-sec. 23	29
Chapitre 6	485
Chapitre 23	394
Chapitre 24, sec. 64	208
Chapitre 26, sec. 5 et 8	479
Chapitre 30	23
Chapitre 36, sec. 12	448
Chapitre 37, sec. 7	407
Chapitre 40	26
Chapitre 48, sec. 5	20
Chapitre 48, sec. 6	18
Chapitre 50, sec. 7	19
Chapitre 56, sec. 12	65
Chapitre 64, sec. 3, 30 et 31	230
Chapitre 65, sec. 4, s.sec. 3	277
Chapitre 78, sec. 21	25 et 26
Chapitre 78, sec. 23, 24 et 25	26, 28 et 235
Chapitre 80, sec. 8	70
Chapitre 80, sec. 23 et 34	30
Chapitre 82, sec. 7	29
Chapitre 82, sec. 9	15
Chapitre 82, sec. 15	168
Chapitre 83, sec. 13	444
Chapitre 83, sec. 23	29
Chapitre 83, sec. 46 et 53	237

		Pages.
Chapitre	83, sec. 63	25, 26, 28 et 341
Chapitre	83, sec. 64	465
Chapitre	83, sec. 72	468
Chapitre	83, sec. 86	229
Chapitre	83, sec. 113	25, 26 et 27
Chapitre	83, sec. 115	334
Chapitre	85	13
Chapitre	85, sec. 3	329
Chapitre	87, sec. 1 et 8	87
Chapitre	93, sec. 18	96
Chapitre	94, sec. 7	263
Chapitre	102	489 et 490
Chapitre	103	485 et 490
Chapitre	106, sec. 7	31

STATUTS REVISÉS DU CANADA DE 1886.

		Pages.
Chapitre	178, sec. 59, 60 et 61	485

STATUTS REFONDUS DE LA PROVINCE DE QUÉBEC.

Arts.	Pages.
3438	171

CODE CIVIL.

Arts.	Pages.	Arts.	Pages.	Arts.	Pages.
14	466	1301	5	1701	166
17 & 23	407	1311	330	1939	458
29	339	1382	321	1994	109
400	394	1423	343	1998	67
510	71	1501	414	1999	67
538	395	1536	383 et 459	2000	67
558	79	1537	459	2027	367
972	378	1538	459	2090	407
1005	88	1539	104, 383 et 459	2102	383
1053	89	1540	459	2260	222
1161	124	1570	322	2268	423
1187	61	1571	111	2420	351
1188	61 et 338	1609	214	2424	351
1208	278	1624	301	2426	434
1233	328	1637	180		

CODE DE PROCÉDURE CIVILE.

Arts.	Pages.	Arts.	Pages.	Arts.	Pages.
15	61	453	469	834	67, 233, 464 et 466
34	275	478	4 et 90	841	466
38	268 et 275	482	113 et 265	854	77 et 464
48	342	483a	334	866	1
60	275	484	113 et 334	869	406
69	342	515	406	887	23 et 301
79	269	560	329 et 466	935	16
80	269	577	1	936	16
89	23 et 335	582	329	941	461
90	23	586	437	955	119
91	23	587	437	1084	272
117	269	590	213	1105	301
123	333 et 339	597	213	1106	301
129	339	729	18	1115	23 et 69
137	339	745	4	1116	69
148	467	747	165	1118	470
150	177	796	88	1119	422
207	467	798	59	1121	470 et 471
226	512	802	59	1122	327 et 458
251	432	819	77 et 464	1188	263
252	432	823	69	1341	265

CODE CRIMINEL.

Art.	Pages.
89	151

CODE MUNICIPAL.

Arts.	Pages.	Arts.	Pages.
3	90	361	115
4	90	1004	208

Stanford Law Library
3 6105 062 602 649